



**REPUBLIC OF SOUTH AFRICA  
IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Case Number: 2021/11607**

**REPORTABLE: YES  
OF INTEREST TO OTHER JUDGES: YES  
REVISED: NO**

**SIGNATURE**

**23 FEBRUARY 2023**

In the matter between:

**CNN**

**Applicant**

and

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**JUDGMENT**

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**MARUMOAGAE AJ****A INTRODUCTION**

[1] This is an unopposed application where the applicant seeks an order in the following terms:

[1.1] The settlement agreement that was made an order of court on 14 October 2022 is varied and 'pension interest' as appearing in paragraph 5.1.1 and 5.1.2 of the settlement agreement that was made an order of court is deleted and substituted with 'accrued pension benefit'.

[1.2] The amendment settlement agreement is made an order of court.

[1.3] The Respondent is ordered to pay the costs of this application in the event of opposition.

[2] The issue main issue in this application is whether this court can vary a settlement agreement by replacing a statutorily recognised and defined phrase 'pension interest' with the phrase 'accrued pension benefit' which is

not defined in the Divorce Act.<sup>1</sup> But most importantly, to determine whether such an order can be enforced.

## **B BACKGROUND**

[3] This court dissolved the parties marriage on 14 October 2022 and incorporated the parties signed settlement agreement in its order. The respondent resigned from his employment and exited his retirement fund on 7 May 2021. This was about two months after being served with the divorce summons. He was served on 18 March 2021. At the time this court granted the divorce order, the respondent was not a member of a retirement fund (“fund”) and he did not have a pension interest from which the applicant could be allocated a portion.

[4] It appears that at the time the divorce order was granted, the respondent’s pension benefits were still held by the fund. After the divorce order that assigned him 50% of the respondent’s pension interest was granted as per the settlement agreement, the applicant approached the fund with the aim of requesting payment of what she believed was due to her.

[5] The fund informed the applicant that the respondent’s pension benefit had accrued to him and that he is no longer a member of the fund. The fund informed the applicant that the divorce order falls short of the legislative requirements and cannot be enforced. Quiet interestingly, the fund’s Divorce and Maintenance officer transmitted a letter to the applicant on 19 October 2022. In this letter, the applicant was advised that to be assisted, she needed

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<sup>1</sup> 70 of 1979.

to provide to the fund with a divorce order directing the fund to pay a pension benefit as opposed to a pension interest. Further that what fund was holding on behalf of the respondent was his accrued pension benefit and his pension interest was nil. Hence the divorce order in its current state could not be enforced.

[6] The contents of the letter from the fund prompted the applicant to bring an application to amend the divorce order which incorporated the settlement agreement by amending the phrase 'pension interest' and replacing it with 'accrued pension benefit'.

[7] The matter was set down on an unopposed roll on 16 January 2023. There was no appearance on behalf of the respondent and Adv Kalashe appeared on behalf of the Applicant. During oral argument, I inquired from Adv Kalase whether it was competent to vary an order by replacing a statutorily prescribed phrase 'pension interest' with a phrase "accrued pension benefit" which is not legislatively recognised. Most importantly, I sought clarity whether such an amendment can be enforced in terms of section 7(8) of the Divorce Act.<sup>2</sup>

[8] Confronted with this difficulty, Adv Kalashe then requested that the matter be stood down to allow him to prepare short heads of argument to substantiate his argument. I agreed, and postponed the matter to Friday, 20 January 2023. The heads of argument were uploaded on caselines on Thursday, 19 January 2023.

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<sup>2</sup> 70 of 1979.

[9] In the heads of argument, it was pointed out that the intended variation was occasioned by the fact that the applicant resigned from his employment on 7 May 2021 before the divorce order was granted. Further that, due to the resignation, there are no pension interest that existed at the time of divorce because the applicant was no longer a member of a pension fund.

[10] During argument, Adv Kalashe argued that the phrase 'pension interest' made it difficult for the applicant to claim her entitled portion of the respondent's pension benefit. Further that to cure this defect, there was a need to refer to the benefit as 'accrued pension benefit' because the benefit accrued to the respondent when he resigned from his employment.

## **C APPLICABLE LEGAL PRINCIPLES AND ANALYSIS**

### ***i) Variation of divorce orders***

[11] In terms of section 7(1) of the Divorce Act:<sup>3</sup>

*'[a] court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other'.*

The parties engaged in divorce proceedings are within their rights to negotiate the terms of their divorce and agree on various aspects including the division of one or both parties' pension interests. By voluntarily placing their signatures on their negotiated settlement agreements in the presence of their witnesses,

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<sup>3</sup> 70 of 1979.

parties expressly declare that they are satisfied with the contents of their agreement and will be bound by the terms expressed thereto.<sup>4</sup>

[12] Usually, the court that is approached to dissolve the parties marriage is requested to make the parties settlement agreement an order of court. In *Eke v Parsons*, the Constitutional Court authoritatively held that:

*'[o]nce a settlement agreement has been made an order of court, it is an order like any other. It will be interpreted like all court orders'.<sup>5</sup>*

Given the fact that the settlement agreement will effectively become an order of the court, it is desirably that it is drafted with clarity to prevent any ambiguity regarding the order that the court will eventually make. In *AVW v SVW and Others*, the court held that:

*'[i]t is trite that settlement agreements ought only to be made orders of court if: the agreement can be enforced as an order of court'.<sup>6</sup>*

[13] It cannot be denied that a settlement agreement signed by divorcing parties that prescribes that the fund which one of the spouses is an active member should pay to the non-member spouse a portion of the member's pension

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<sup>4</sup> See *PL v YL* 2012 (6) SA 29 (ECP) para 6, where it was held that '[a] settlement agreement, on the other hand, is what its name says it is: an agreement. It confers contractual rights and obligations on the parties thereto. And a contract as a source of dispute and litigation is notorious. Where a contractual dispute arises, the law of contract dictates what the remedy and ultimate resolution should be, the outcome of which is a court order capable of immediate execution'.

<sup>5</sup> 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 29.

<sup>6</sup> (3118/2021) [2022] ZAWCHC 74 (20 April 2022) para 8. The court further held that '[m]aking a settlement an order of court changes the nature of the agreement in that it provides the parties with a method to execute thereon'. See also *Ex parte Le Grange and Another; Le Grange v Le Grange* [2013] 4 All SA 41 (ECG); 2013 (6) SA 28 (ECG) (1 August 2013) para 32, where the court held that '[w]hat emerges from this is that the making of an order in terms of an agreement as envisaged in section 7(1) brings about a change in the status of the rights and obligations of the parties to the settlement agreement. The reason for this lies in the fact that the terms of the agreement are incorporated in an order of court. The granting of the consent judgment is a judicial act. It vests the settlement agreement with the authority, force and effect of a judgment'.

interest will be enforceable should the agreement be made an order of court. In this case, it appears that neither the court nor the applicant was aware at the time the divorce order was granted that the respondent had already exited his fund. It does not appear that the respondent bothered to bring this to the attention of both the applicant and the court. It appears that the applicant only found out this situation when she contacted the fund to request payment. The applicant was incorrectly advised by the fund to approach this court to vary the divorce order to allow her to claim what the fund referred to as the respondent's accrued pension benefit. As it will be shown below, such amendment would be unenforceable considering the current legal framework.

[14] Where there is a justifiable need to do so, any litigant can approach the court that granted an order to vary its own order. Rule 42(1)(b) of the Uniform Rules of Court provides the court with discretion either on its own accord or on application by an affected party to rescind or vary any order or judgment which is ambiguous, or where that judgment has a patent error or omission. The court can only rescind or vary to the extent of such ambiguity, error or omission.

[16] In *Crisp v Crisp*, the court held that to properly adjudicate variation applications:

*'... the court [must] first identify the true nature of the "variation" sought by the applicant, which relief is somewhat obscured by the ambivalent wording of the prayer. The verb "to vary" in relation to a court order or judgment can have two different meanings. First, it can be used in the sense contemplated in the exceptions mentioned in the Estate Garlick*

*judgment and as reflected in rule 42(1), supra, viz the variation with retrospective effect of an incorrect, ambiguous or incomplete order. Second, it can be used in the sense of modifying an existing order correctly made and accurately worded, but rendered no longer appropriate for some reason arising subsequent to the granting thereof.*<sup>7</sup>

[17] The applicant seeks to modify an order that was made by the court that was not aware of the respondent's fund membership status at the time the order was made. The applicant only learnt that the respondent exited his fund when she sought to enforce payment in terms of the divorce order that this court granted. The divorce order that ordered the fund to pay a percentage of the member spouse's pension interest to the respondent could not be enforced in terms of sections 7(1) and 7(8) of the Divorce Act. These provisions deal with a pension interest which the respondent did not have at the time the divorce order was granted.

[18] It cannot be disputed that even if the order granted by this court was correct and accurately worded, if there is a valid reason that arose after the order was granted that rendered it no longer appropriate, such an order can be varied. In this matter, the applicant is not necessarily confronted by an order that has been rendered unenforceable because of the reason that was established after the order was granted. Even though the applicant only discovered that the respondent had resigned after the order was granted, at the time the order was granted the respondent did not have a pension interest as defined in section 1 of the Divorce Act. This court was led to grant an unenforceable

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<sup>7</sup> [2000] JOL 5887 (SE) 10-11.



order, which unfortunately cannot be made enforceable even if the I where to order that it should be varied, as will be demonstrated below.

***ii) The law regarding Pension interests in South Africa***

[19] This matter raises an important gap in the law regulating pension interests in South Africa. The term ‘pension interest’ is technically defined in such a way as to characterise the contributions plus investments held by funds on behalf of their member as their benefits differently depending on events that entitle member spouses to claim these benefits. If the member spouse is entitled to receive his or her benefit any time before the divorce due to dismissal, retirement, retrenchment, or resignation as prescribed by the rules of his or her fund, this benefit is referred to as a pension benefit and does not constitute part of the member’s estate for as long as it is held by the fund.<sup>8</sup> If the member receives the benefit during the marriage, such benefit will constitute part of his or her joint estate if married in community of property or growth of his or her estate if married with the accrual system.

[20] There is no adequate legal framework that allows non-member spouses to claim portions of these benefits directly from the funds when member spouses exit their funds before divorce. This has allowed member spouses, as is the case in this matter, to resign after being served with divorce summons to ensure that they keep these benefits out of the reach of their non-member spouses. This is a serious concern that the legislature is yet to address.

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<sup>8</sup> See *Oosthuizen NO v Barnard and others* [2023] JOL 57513 (GP) para 8.

[21] Section 1 of the Divorce Act defines a pension interest regarding a pension fund in relation to a party to a divorce action who is a member of a pension fund (excluding a retirement annuity fund) as:

*'... 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'.*

[22] This means that a pension interest is that portion of the member spouse's contributions plus investments thereon held by his or her fund which is calculated by that fund as at the date of divorce after receiving a divorce order instructing it to pay part of such contributions plus investments to the non-member spouse. The fund will determine what amount the member spouse would be entitled to receive had such member exited the fund because of resignation as at the date of divorce. Some spouses may, before their divorce, request member spouses' retirement funds to provide breakdowns of what member spouses would receive if they were to resign on the dates of divorce. Some spouses do not request for such breakdowns but plead that the court assign a particular percentage, usually 50%, which will then be worked out by the funds named in divorce orders.

[23] The non-member spouse can only be assigned a portion of the member spouse's benefit that would accrue to the member spouse because of the divorce. In other words, divorce becomes a contingent event that leads to the release of the portion of the member spouse's pension interest to the non-member spouse.

[24] Ordinarily, the pension interest is not an asset that is readily available to be shared when the parties divorce.<sup>9</sup> It is not entirely clear why there is a need for a special legislative framework that “regards” or “deems” pension interests to be part of member spouses’ estates only for the purposes of divorce and not automatically part of their estates by operation of law. Lube J in *De Kock v Jacobson and Another*,<sup>10</sup> opined that:

*‘The reason why a spouse married in community of property was believed to be not entitled to a share of the pension interest of the other spouse is because it was not regarded as an asset of the spouse who was a member of the fund and therefore could not form part of a joint estate’.*<sup>11</sup>

[25] Because he was not concerned with the position before the pension became due, Lube J held that he:

*‘... did not have to deal with the complicated and not altogether satisfactory reasons why the pension interest of the member spouse was not regarded as an asset in his estate ...’.*<sup>12</sup>

Most importantly, he correctly further opined that there:

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<sup>9</sup> See *Old Mutual Life Assurance Company (SA) Limited and Another v Swemmer* [2004] 4 BPLR 5581 (SCA) para 19, where Van Heerden AJA opined that ‘the necessary implication of the “deeming provision” in section 7(7)(a) of the Divorce Act, read together with the relatively narrow definition of “pension interest” in section 1(1), is that any other “right” or “interest” which the member spouse may have in respect of pension benefits which have not yet accrued is – at least after 1 August 1989 – not to be regarded as an asset in the estate of such member spouse in determining the patrimonial benefits to which the parties to the divorce action may be entitled’.

<sup>10</sup> 1999 (4) SA 346 (W).

<sup>11</sup> *Ibid* at 348.

<sup>12</sup> *Ibid*.

*'... is no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce'.<sup>13</sup>*

[26] Nonetheless, the legislature created a legislative framework that makes it possible for the non-member spouse to be able to claim a portion of the member spouse's pension interest as at the date of the divorce. In terms of section 7(7)(a) of the Divorce Act:

*'[i]n 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'.*

Petse JA (as he then was) in *Ndaba v Ndaba*,<sup>14</sup> held that section 7(7)(a):

*'... creates a fiction that a pension interest of a party becomes an integral part of the joint estate upon divorce which is to be shared between the parties'.*

[27] Once the legislative fiction has been created, the non-member spouse whose marital regime allows for sharing of assets will be entitled to claim a portion of the non-member spouse's pension interest. The entire pension interest will be part of the joint estate when the parties are married in community of property, or growth of the member's estate if parties are married with the application of the accrual system. In practice, courts usually award portions that parties either agreed upon or one of the parties claimed in their pleadings. Courts exercise their discretion when making these orders in terms of section 7(8)(a)

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<sup>13</sup> Ibid.

<sup>14</sup> [2017] 1 All SA 33 (SCA); 2017 (1) SA 342 (SCA) para 26.

of the Divorce Act which states that the divorce court 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) *the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;*  
*...'*

[28] Section 7(8) of the Divorce Act plays an important practical role. First, it provides the divorce court with a discretion to make an order that a portion of the member spouse's pension interest is due to the non-member spouse. Secondly, it empowers the court to make an order against the identified retirement fund which may or may not have been joined in the divorce proceedings as a party to pay the prescribed portion of the member spouse's pension interest to the non-member spouse when the benefits accrue to the member spouse. Thirdly, it authorizes the court to direct the registrar of the court to notify the identified fund of the order for such a fund to endorse its records in respect of its member that a portion of that members benefits will be paid to the non-member spouse. Fourthly, it creates an obligation on the

administrator of the identified fund, once an endorsement in the records of the fund has been made, to provide proof of such endorsement to the court in writing. In *Ndaba v Ndaba*, it was held that

*'Section 7(8) ... creates a mechanism in terms of which the Pension Fund of the member spouse is statutorily bound to effect payment of the portion of the pension interest (as at the date of divorce) directly to the non-member spouse. ... The non-member spouse is thereby relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest with all its attendant risks'.<sup>15</sup>*

[29] Unfortunately, in practice the procedure laid out in section 7(8) of the Divorce Act is partially followed. Usually, it is non-member spouses or their legal representatives that notify the funds of divorce orders and their obligation to pay non-member spouses, and not courts' Registrars. Retirement funds usually also do not report back on the endorsements of their clients' records. Practically, it does not appear as if it is desirable for retirement funds to be legislatively required to report back to the courts. This may increase the registrars' workloads. However, this remains a legislative imperative.

[30] It appears that compliance with this requirement may have been necessary before the amendments that brought the clean-break principle came into effect. These amendments made divorce not only one of the contingent events that leads to the release of benefits but also immediate release thereof on the date of divorce in the form of

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<sup>15</sup> [2017] 1 All SA 33 (SCA); 2017 (1) SA 342 (SCA) para 27.

pension interests.<sup>16</sup> In terms of the clean break principle, divorcing non-member spouses do not have to wait until their member spouses exit their retirement funds due to retirement, resignation, retrenchment, dismissal or even death, which can be years after the divorce, before they are paid what is due to them. The clean break principle is facilitated in terms of section 37D(4) of the Pension Funds Act,<sup>17</sup> which dictates that:

[30.1] the portion of the member's pension interest that should be paid to the non-member spouse must be deducted by a retirement fund named in or identified from the divorce order;<sup>18</sup>

[30.2] within 45 days of the submission of the court order by the non-member spouse to the retirement fund named or identified in the divorce order, such retirement fund must request the non-member spouse to elect whether to receive the allocated portion directly or for that portion to be transferred to a retirement funds to which he or she is a member;<sup>19</sup>

[30.3] the deduction must be made on the date on which the non-member spouse makes an election on how he or she should

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<sup>16</sup> See generally *Wiese v Government Employees Pension Fund and Others* 2012 (6) BCLR 599 (CC); *Ngewu and Another v Post Office Retirement Fund and Others* 2013 (4) BCLR 421 (CC). See also The Pension Funds Amendment Act 11 of 2000 and Government Employees Pension Law Amendment Act 19 of 2011. See also *M N v F N* 2020 (2) SA 410 (SCA) para 2, where it was stated that '[t]he 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'.

<sup>17</sup> 24 of 1956.

<sup>18</sup> Section 37D(4)(a)(i)(aa) of the Pension Funds Act.

<sup>19</sup> Section 37D(4)(b)(i) of the Pension Funds Act.

be paid and after he or she has provided the fund with details of how payment must be effected,<sup>20</sup>

[30.4] the named or identified retirement fund must pay or transfer the amount prescribed in the divorce order within 60 days of being informed of how the amount must be dealt with in relation to the non-member spouse;<sup>21</sup>

[30.5] if the non-member spouse fails to make an election or identify the retirement fund to which the prescribed amount should be transferred, the named or identified retirement fund must pay the amount directly to the non-member spouse within 30 days of the expiry of the period he or she was supposed to make an election;<sup>22</sup>

[30.6] if the retirement fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, such retirement fund must retain the amount and any fund until such time as details of how that payment must be effected is made available to the retirement fund by the member spouse, the non-member spouse or any other person.<sup>23</sup>

[31] In this matter, the applicant wishes to effect the clean break between herself and the respondent by being paid a portion of the respondent's pension interest. The applicant would only be entitled to claim from the

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<sup>20</sup> Section 37D(4)(a) of the Pension Funds Act.

<sup>21</sup> Section 37D(4)(b)(iii) of the Pension Funds Act.

<sup>22</sup> Section 37D(4)(b)(iv) of the Pension Funds Act.

<sup>23</sup> Section 37D(4)(b)(v) of the Pension Funds Act.



respondent's pension interest if that benefit did not accrue before the divorce. Maya JA (as she then was) in *Eskom Pension and Provident Fund v Krugel and Another*,<sup>24</sup> held that:

*'[o]nce the pension benefit has accrued ie beyond the date of divorce at which time the pension interest converts into a pension benefit, the provisions of ss 7(7) and 7(8) are no longer applicable'.*

This is the challenge that confront the applicant. She is claiming a portion of the benefits that accrued to the respondent before their divorce was granted. In other words, the applicant is relying on section 7(8) of the Divorce Act to claim a pension benefit that already accrued to the respondent through resignation as opposed to a pension interest which ought to have accrued to the respondent due to the divorce. Section 7(8) of the Divorce Act regulates the latter.

[32] The applicant did not challenge the constitutionality or otherwise of sections 7(7) and 7(8) read with section 37D(4) of the Pension Funds Act and there is no need to consider this issue in this judgment. It is however, important to highlight some of the challenges with the legal framework pertain to the division of “*retirement benefits*” generally when parties married in accordance with any of the marital regimes that allow for the sharing of patrimonial benefits are engaged in divorce proceedings.

[33] This case raises an important social issue regarding fund members who exit their funds when they are embroiled in divorce proceedings. Particularly when

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<sup>24</sup> [2011] 4 All SA 1 (SCA); 2012 (6) SA 143 (SCA) (31 May 2011)

these members cash in their benefits or instruct their funds to purchase annuities for them using their accrued retirement benefits.<sup>25</sup> This practice makes it difficult for non-member spouses to claim their entitled share of such benefits on divorce.<sup>26</sup> This conduct appears to be prevalent in practice and those who are prejudiced do not have the financial resources to bring these cases to the courts for adjudication.

[34] In *Fourie v Vrystaat Munisipale Pensionfond and Others*,<sup>27</sup> the member spouse was a Chief Executive Officer of the fund to which he was a member. He exited his retirement fund four months before the court granted a divorce order due to retirement. The fund was placed under curatorship due to financial irregularities in its administration which were attributed to the member spouse.

[34.1] The curator of the fund instituted civil claims against the member spouse to recover the misappropriated funds. On the strength of these civil claims and in terms of section 37D(1)(b)(ii) of the Pension Funds Act, the curator withheld the member spouse's pension benefit pending the determination of the civil claims in respect of the damage caused to the Fund by reason of the member spouse's misappropriation of funds.<sup>28</sup>

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<sup>25</sup> See South African Law Reform Commission 'Review of aspects of matrimonial property law' Project 100E Issue Paper 41 (06 September 2021) 9.21, where the commission observed that an '... issue which has a serious impact on financially weaker spouses, who are generally women, is that the law currently allows retirement fund members to hide retirement benefits and take them out of reach of non-member spouses by converting pension benefits to living annuities'.

<sup>26</sup> See *Ndaba v Ndaba* [2017] 1 All SA 33 (SCA); 2017 (1) SA 342 (SCA) para 25, where it was held that '... s 7(7)(a) [of the Divorce Act 70 of 1979] ... vests in the joint estate the pension interest of the member spouse for the purposes of determining the patrimonial benefits, to which the parties are entitled as at the date of their divorce'.

<sup>27</sup> (2973/2021) [2022] ZAFSHC 98 (20 May 2022).

<sup>28</sup> *Ibid* para 4.

[34.2] In their settlement agreement which was made an order of courts, it was stated that the non-member spouse would receive R 12 000 000.00 from the member spouse's pension interest. The non-member spouse approached the court claiming this amount arguing that payment is due to her by virtue of a decree of divorce incorporating a settlement agreement.<sup>29</sup>

[34.3] The fund and the curator argued that the divorce order upon which the non-member spouse relied as the basis of her claim was a nullity. In that at the time of the divorce, the member spouse did not have a pension interest which could be apportioned to the non-member spouse. Further that the member spouse retired and exited the fund before the divorce and his pension benefits which had accrued to him were subsequently withheld by the Fund in terms of section 37D (1) (b) (ii) of the PFA.<sup>30</sup>

[34.4] The court agreed with the fund and the curator and dismissed the non-member spouse's claim. It held that she was not entitled to the payment that she sought.<sup>31</sup>

[35] In this matter, the law is against the applicant. She cannot claim pension benefits that accrued before the divorce was ordered because section 7(8) of the Divorce Act only deals with a benefit that accrues to the member spouse due to divorce. As such, the variation sought by the applicant will fly in the face of section 7(8) of the Divorce Act and it will not be enforceable. To the

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<sup>29</sup> Ibid para 2.

<sup>30</sup> Ibid para 9.1.

<sup>31</sup> Ibid para 21.

extent that the fund advised the applicant to approach the court to vary the divorce order with a view to direct the fund to pay her a portion of the respondent's 'accrued pension benefits', the advice was misconceived, misplaced and legally flawed. The applicant ought to have challenged the current legal framework. Unfortunately, as the law stands, the court can only order the fund to pay a pension interest as defined in section 1 of the Divorce Act in terms of section 7(8) of the Divorce Act, and not an 'accrued pension benefit'. The current legal position allows unscrupulous member spouses to deliberately prejudice their non-member spouses' claims to their "*retirement benefits*" by resigning from their work after being served with divorce summons.

#### **D CONCLUSION**

[36] Non-member spouses can only claim parts of their member spouses' contributions plus investments which will conveniently be referred to as pension interests for the purposes of divorce. This will be the case if member spouses were active members of such retirement funds as at the date of divorce. This means that non-member spouses' access to their member spouses benefits is dependent, first on divorce, and secondly, on whether member spouses are active in their funds, even though these benefits are still held by these funds. This is the conundrum that the applicant is facing because at the time the divorce was granted, the respondent was not a member of a fund and there was no pension interest from which a portion could be allocated to her. Unfortunately, the applicant did not challenge the law in this matter, which I am bound to follow.

Order

[37] The following order is made:

[37.1] The application is dismissed.

[37.2] No order as to costs.

**C MARUMOAGAE**  
**ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION**  
**JOHANNESBURG**

*Electronically submitted*

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 22 February 2023 at 14:00.

#### **APPEARANCES**

COUNSEL FOR THE PLAINTIFF:           ADVOCATE L KALASHE

INSTRUCTED BY:                           NTOZAKE ATTORNEYS

ATTORNEY FOR THE DEFENDANT: NO APPEARANCE

DATE OF THE HEARING: 20 JANUARY 2023

DATE OF JUDGMENT: 23 FEBRUARY 2023