

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: YES / NO
- (2) OF INTEREST TO OTHER JUDGES: YES / NO
- (3) REVISED

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

CASE NUMBER: 73608/2019

DATE: 22 November 2023

**M[...] M[...]**

Plaintiff

V

**O[...] M[...]**

Defendant

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JUDGMENT

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## MABUSE J

[1] This matter came before me as a stated case in terms of rule 33 of the Uniform Rules of Court (the rules). It provides that:

*“33(1) The parties to any dispute may, after the institution of the proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.”*

33(2) provides in part that:

*“Such statement shall set forth the facts of the case agreed upon, the questions of law in dispute between the parties and their contentions thereon .....*”

[2] In terms of rule 33(2) the questions of the law in dispute and which this court is required to adjudicate were as follows:

(i) Can a former member spouse who has ceased to be a member of a pension scheme before finalisation of divorce proceedings but who received his or her a retirement benefits after divorce be ordered to pay a portion of such benefits that accrued to him during the divorce to his or her former non-member spouse?

(ii) What remedy, if any, is available to a non-member spouse to enforce his or her rights in regard to the pension interest that accrued to a member spouse whilst the divorce proceedings are underway?

(iii) Whether the terms of the Settlement that have been made an order of court can simply be ignored because they were the result of a Justus error.

(iv) The interpretation and legal effect of the terms of a clause relating to the division of the pension fund (sic) and annuity of the parties' contained in the Settlement Agreement concluded by the parties and incorporated in the decree of divorce of 21 July 2017.

**[3] THE BACKGROUND**

[3.1] According to the combined summons, the Plaintiff in this matter, [...] M[...] P[...] is an adult female person ordinarily resident at [...] Section [...], Mamelodi West, Pretoria.

[3.2] The Defendant, R[...] M[...], is an adult male pensioner ordinarily resident at [...], Itsoseng Section, Skilpadfontein, Marapyane.

[3.3] The dispute in this matter arises from the interpretation of sections 7(7) (a) and 7(8) of the Divorce Act 70 of 1979 (the Divorce Act).

[3.4] The Plaintiff and the Defendant (jointly called the parties) herein, were married to each other in community of property on 7 August 1998. Their marriage was subsequently terminated by an order of the Pretoria Regional Court on 21 July 2017. A Settlement Agreement signed by them on the 21st of July 2017 at Pretoria was, by agreement between them, made an Order of Court.

[3.5] With regard to the parties' pension interests and annuity the parties had agreed, and the Settlement Agreement had stated, inter alia, that:

*"1.3.1 The Plaintiff was a member of the D[...] Provident Fund and, in terms of Section 7(8) of the Divorce Act 70 of 1979, the Defendant is entitled to 50% of the Plaintiff's Provident Fund interest calculated as at the date of divorce;*

*1.3.2 the Defendant was a member of the I[...] Provident Fund and, in terms of Section 7(8) of the Divorce Act Number 70 of 1979, the Plaintiff is entitled to 50% of the Defendant's Provident fund interest calculated as at the date of divorce;*

.....

.....

*1.3.5 the Settlement Agreement contained all the terms and conditions agreed upon by the parties and that no variation, or abandonment or waiver of rights or obligations, whether express or implied shall be binding unless contained in the Settlement Agreement or subsequently reduced in writing and signed by both Parties.”*

[4] Notwithstanding the said Court Order; the fact that the parties’ marriage relationship was terminated on 21 July 2017 by a Court order incorporating a Settlement Agreement; the fact that during October 2017 the Defendant received payment of the said amount of R1, 701, 522.40 from his Pension Fund, the Plaintiff still has not, by 5 June 2023, received the 50% of the Defendant’s pension interest as agreed by the parties in the Settlement Agreement and ordered by the Court.

#### [5] THE PARTIES’ CONTENTIONS

[5.1] The Plaintiff contends, on one hand, that:

[5.1.1] because they were married in community of property, their pension interests were to be part of the assets of their joint state for purposes of determining their patrimonial benefits.

[5.2.2] furthermore that, based on the Court Order dated 21 July 2017, she is entitled to payment of an amount equal to 50% of the amount that the Defendant received from the I[...] Group Provident Fund (Investec).

[5.3] On the other hand, the Defendant contends that:

[5.3.1] at the time of the dissolution of their marriage, he was not a member of any pension fund scheme, following his retirement and termination of his membership of the pension fund scheme prior to the dissolution of the marriage between them.

[5.3.2] On that basis, so contends the Defendant furthermore, the determination of the parties' joint state cannot be in respect of any pension fund benefit since the Defendant had ceased, on 31 March 2017, to be a member of any pension fund scheme.

[5.3.3] The Defendant contends furthermore that any pension fund benefit that had existed during their marriage relationship had accrued to him prior to the dissolution of the marriage and not at the time of or post dissolution. Therefore, any concession that might have been made by him in the past concerning the Plaintiff's entitlement to 50% of his pension benefits was because of *justus error*.

#### **[6] THE ISSUES THAT THE COURT IS REQUIRED TO DECIDE.**

[6.1] Can a former member spouse who has ceased to be a member of a pension scheme before finalisation of divorce proceedings but who received his or her retirement benefits after the divorce be ordered to pay a portion of such benefits that accrued to him during the divorce to his or her former non-member spouse?

[6.2] What remedy, if any, is available to a non-member spouse to enforce his or her rights regarding the pension interest that accrued to a member spouse whilst the divorce proceedings are underway?

[6.3] Whether the terms of settlement that have been made an order of court can simply be ignored because they were the result of *justice error*?

[6.4] The interpretation and legal effect of the terms of the clause relating to the division of the benefits fund and annuity of the parties contained in a Settlement Agreement concluded by the parties and incorporated in the Decree of Divorce of 21st July 2017.

**[7] Can a former member spouse who has ceased to be a member of a pension scheme before finalisation of divorce proceedings but who received his or her retirement benefits after divorce be ordered to pay a portion of such benefits that accrued to him during the divorce to his or a former non-member spouse?**

[7.1] This Court takes it that this is not a general question but a question that relates particularly to the facts of this case. The simple answer to this question is, yes. The facts of the parties' case show that their case is a quintessential example of such a case where a member spouse who ceased to be a member of a pension fund before the finalization of a divorce action between the parties but who received the benefits of his or her retirement after the divorce may be forced to pay a portion of such benefits to a non-member spouse.

[7.2] The Defendant ceased to be a member of the I[...] on his retirement on 31 March 2017. At this stage the gross benefit due to him amounted to R1, 701, 522.40.

[7.3] What is of paramount importance though is that, for undisclosed reasons, the Defendant's pension benefits were not paid to him on retirement or immediately thereafter. They were preserved under circumstances not disclosed to this court until the date of the divorce, in other words, on 21 July 2017 and until furthermore they were paid to him only during October 2017. The amount of R1, 71, 522.40 remained, until the 21st of 2017, and for all intents and purposes, the parties' pension benefits, in different proportions, in their joint estate. Both were entitled, in terms of s 7(7)(a), to the pension benefits to the sum of R1,701,522.40, from the date on which the divorce

action commenced until the date of the divorce to such pension benefits when their joint estate was dissolved by an order of Court. The fact that the Defendant's membership of the I[...] terminated on 31 March 2017 is immaterial because at that stage they were already parties to a divorce action as contemplated by the provisions of s 7 (7)(a) of the Divorce Act. The pension benefits were already part of the parties' joint estate. S 7(7)(a) of the Divorce Act states that:

*"7(7)(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."*

[7.4] In terms of s 2 of the Divorce Act, a divorce action shall be deemed to be instituted on the date on which the summons is issued, or the notice of motion is filed, or the notice is delivered in terms of the rules of court, as the case may be. In this current matter the divorce action was commenced by the issue of summons under case number GP/PTA/0748/2017. The divorce summons in this current divorce matter was issued on 30 March 2017 by the Pretoria Regional Court. The Plaintiff and the Defendant therefore became *"parties to a divorce action"*, within the meaning of s 7(7)(a) of the Divorce Act, on 30 March 2017. The Defendant was notified that he was *"a party to a divorce action"* on service upon him of a copy of the said divorce summons on 31 March 2017. Therefore, when the Defendant retired on 31 March 2017, he was already a party to a divorce action and the provisions of s 7(7)(a) of the Divorce Act were already applicable to *"the pension interest"* of the parties.

[7.5] It will be recalled that section 1 of the Divorce Act defines *"pension interest"* as follows:

*'pension interest', in relation to a party to a divorce action (the Defendant has been a party to a divorce action since 30 March 2017 when the divorce action commenced) 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 the office."*

Accordingly, s 7(7)(a) vested in the parties' joint estate, from 30 March 2017, the pension interest of the member spouse for the purposes of determining the patrimonial benefits to which they are entitled on the day of their divorce. This is how the Supreme Court of Appeal put it in **GN v JN 2017 (1) SA 342 (SCA)** paragraph [25]:

*"Accordingly, the writer notes that, absent a court order in terms of s 7(8), the non- member spouse effectively forfeits his or her entitlement in the pension interest of the member spouse. I do not agree with these sentiments for the following reasons. First, s 7(7)(a) is self-contained and not made subject to s 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not dependent on Section 7(8). To my mind, it would be inimical to the scheme and purpose of section 7(7)(a) if it only applies if the court granting a decree of divorce makes a declaration that in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party shall be deemed to be*



*part of his or her assets. The grant of such a declaration would amount to no more than simply echoing what section 7(7)(a) decrees. For the same reasons it was not necessary for the parties in this case to mention their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed would be shared equally between them.”*

[7.6] According to the above paragraph, the vesting of the patrimonial benefits occurs automatically in terms of the provisions of s 7(7)(a) of the Divorce Act. Because it occurs automatically by operation of the law there is no need even to plead it. It is also not even necessary to mention it in the settlement agreement. In this regard, a prayer for *“the division of the joint estate”* is sufficient to cover even the patrimonial benefits.

The idea of a joint estate, as used by the SCA in the preceding quotation, conjures up memories of the estates of both the husband and his wife, following the principle of being joined together and becoming one joint estate. In terms of the law, marriage in community of property means that there is only one joint estate belonging to the spouses in which they each have an equal undivided one-half share. The joint estate consists of assets and liabilities which the parties acquired before and after their marriage. This principle was recognised by the SCA in paragraph [26] of the judgment of **GN v NN** *supra*, when it had the following to say:

*“[26] In my judgement, by inserting s 7(7)(a) in the Act, the legislature intended to enhance the patrimonial benefits of the non-member spouse over that which, prior to its insertion, had been available under common law. The language of s 7(7)(a) is clear and unequivocal. It invests in the joint estate (my own underlining) the pension interest of the member spouse for the*

*purpose of determining the patrimonial benefits to which the parties are entitled as at date of their divorce. Most significantly, the legislature's choice of the word, "shall", coupled with the word "deemed", in s 7(7)(a) is indicative of the peremptory nature of this provision. The section creates a fiction that a pension interest of the party becomes an integral part of the joint state (my own underlining) upon divorce which is to be shared between the parties."*

[7.7] It is not the divorce or termination of a marriage relationship of the parties that vests the member's spouse pension interest in the joint estate for, this has been achieved by s 7(7)(a) on the day the member spouse became a party to a divorce action. The day on which the marriage relationship of the parties is terminated by an order of Court, in other words, the day of the divorce only serves to determine the day on which the joint estate is dissolved and secondly, the percentage of the pension interest that the parties are each entitled to.

[7.8] Of course, a joint estate does not necessarily mean marriage in community of property for, people who are not married to each other may have a joint estate. But in the context of parties who are married to each other in community of property and who have not excluded such a marriage regime in an antenuptial contract, what meaning other than '*marriage in community of property*' would the expression '*joint estate*' have than '*marriage in community of property*'? That that expression, "joint estate", as used by the SCA in the above judgment means "*community of property*," is evidently clear from paragraph [33] of the **GN v NN** judgment, where the court had the following to say: "*However, sight must not be lost of the fact that the parties in this case were married in community of property.*"

*Consequently, one of the invariable consequences of such a marriage is that subject to a few exceptions not here relevant, the spouses became co-owners in undivided and indivisible half-shares of all the assets acquired during the subsistence of their marriage. And absent forfeiture of benefits under s 9(1) of the Act or an express agreement between the parties to the contrary, each spouse is entitled to half-share of the joint state- whatever it entails.”*

The judgment of the majority in **GN V NN** made this preceding remark when it showed its disagreement with the view expressed by the minority judgment.

[7.9] Is it possible, in our law, for a party in a marriage in community of property to have as his or her an asset that is exclusively his or hers alone, if such an asset was not excluded by an antenuptial contract or a bequest in a will which is subject to a marital exclusion clause that excluded the asset so bequeathed from forming part of the joint estate or community of property? Well, if by using the expression ‘joint estate’ the SCA did not imply ‘marriage in community of property’, especially where the parties were married in community of property, one can only hope that the law will in future expressly state, in s 7(7)(a), that ‘the patrimonial benefits to which the parties in any divorce action may be entitled, shall be regarded as the parties’ assets in a marriage in community of property.’

[7.10] Makgoba JP is also of the same view as shown by his comments in **B.S.M (nee M) v N A M Case number: HCA18/2015[2016] ZALMPPC 3 (17 June 2016)** in the Limpopo Division of the High Court Of South Africa. In paragraph [10] of his judgment, he had the following to say:

*“[10] Section 7(8) of the Divorce Act must be read with Section 7(7). Section 7(7)(a) provides that the contingent pension interest that a member of a pension fund has in the future benefits from a pension is to be classed as an asset in that person's estate for the purposes of division on divorce. It follows that if that person is married in community of property the pension fund interest is an asset in the joint estate of which that person and the non-member spouse each as an undivided half share.*

*[11] This simply means that ex-lege the spouses have an undivided half share in the pension interest of each other. Accordingly, that pension interest is part of the bundle of assets to be divided up between the divorcing spouses. Of course, the pension interest is simply a value calculated as at date of divorce. It is that ‘value’ which falls into the reckoning of the total value of the basket of assets along with all the other assets in the joint estate. When the value of each spouse’s half-share is then known, the assets in the joint estate are then apportioned.”*

See also **Maharaj v Maharaj 2002(2) SA 648 (D) at 651E**

[7.11] It was not necessary that the pension interest of the non-member spouse be paid to her on the date of the finalization of the divorce action because such an amount still must be calculated. It is enough though if on the day of the divorce *order* the provisions of s 7(7)(a) are considered. So, it is irrelevant that the pension interest was paid to Defendant only in October 2017. This is a topic for another day as it involves an investigation into the conduct of I[...] why it only paid the pension interest in October 2017 after the Defendant ceased to be its member on 31 March 2017.

[7.12] Whoever has under his control the pension interest of the Defendant, has a duty in law to comply with a court order. This is the function of s 7(8)(a) (i) of the Divorce Act where the pension interest of the member spouse is still under its control and where an order in terms of s 7(8)(a)(i) of the Divorce Act is made. This so because the non-member spouse to a pension fund cannot claim directly from the fund. As was correctly pointed out by Makgoba JP,

*“[12] The function of Section 7(8)(a) is to enable the Court to give effect to a division of the joint estate by ordering a pension fund to recognize that division and pay or appropriate a portion for the non-member spouse. This is an extraordinary power given to a Court to make an order binding a person who is not a party to the proceedings, that is, the pension fund.*

*The provisions of this subsection mean that if the spouses are married in community property that share of the non-member in the member’s pension interest alluded to in section 7(7), as being the part of the pension interest due to the another party may be subject to an order against the pension fund.”* see *Old Mutual Life Assurance Co. (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) paragraph [17-20] and paragraph [22]

[7.13] Now in this case where I[...] paid the pension interest to the Defendant in October 2017, the duty to pay the Plaintiff her 50% share of the pension interest of the Defendant, fell upon the Defendant from 21 July 2017 and continued until it was discharged by the Defendant.

**[8] What remedy, if any, is available to a non-member spouse to enforce his or her rights in regard to the pension interest that**

**accrues to a member spouse while the divorce proceedings are underway?**

[8.1] This Court refuses to express its opinion on this question because it is not the duty of this court to give any advice on the point. This Court can only observe that such a party, such as the Plaintiff as referred to in the point, has a remedy. in the circumstances set out in the question. The parties' legal representatives must figure out by use of their legally trained minds the remedies that such a spouse must use to enforce his or her rights regarding the pension interest that accrues to a member spouse while the divorce proceedings are underway.

**[9] Whether the terms of a settlement agreement that have been made an order of court can simply be ignored because they were the result of justus error?**

[9.1] There is another way, a brief one, to express this point. Simply put, the question is: whether a court order can simply be ignored because of *justus error*? The simple answer to this question is NO, the terms of a settlement agreement that have been made an order of court may not be simply ignored.

[9.2] It is of paramount importance to point out that a Settlement Agreement, once confirmed by a court, becomes a court order, and must be obeyed by all those involved in it. Section 165(5) of the Constitution of the Republic of South Africa Act 108 of 1996(the Constitution) provides that:

*"165(5) An order or decision issued by a court binds all persons to whom, and organs of state to which, it applies."*

A court order is binding until it is set aside by a competent court and must be complied with, even if the party against whom this order is granted believes it to be invalid. This court must emphasise the responsibility of the citizens of the country, especially parties involved in litigation, to respect the rule of law and pursue an appeal or an application to amend or to rescind a Court Order, if they genuinely believe a decision to be wrongful or illegal. **In Rapholo v National Director of Public Prosecutions and Others Case Number (73576/16) [2016] ZAPPHC 1108 (27 September 2016)**, the Court as per Neukircher AJ, had the following to say in paragraph [1] of her judgment:

*“[1] It is the most basic and fundamental principle of law that all orders of court must be complied with properly until they are set aside and that the most obvious reason for this would be that the integrity of the court system relies upon the upholding of and compliance with the judgments of our courts. Implicit in this too, is that there is respect for a judicial system which has, at its roots, certain rules, and regulations.”* I agree with these sentiments.

The judgment emphasizes that all court orders must be complied with. This means that the Defendant in the current case, must take all reasonable steps to pay out to the Plaintiff 50% of his pension interest in accordance with the court order. Failure to do so will result in the Defendant corking a snook at the court that made the order. He makes himself guilty of contempt of court.

[9.3] In **Culverwell v Beira 1992 (4) SA 490 (WLD)** at page 494A, the court, as per Goldstein J., had the following to say:

*“All orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside.”*

In that case counsel for the respondent had contended that a certain paragraph 2 of the court order which the respondent breached was wrongly granted since the purpose was to render effective the interim interdict in paragraphs 1.2 and 1.3 of the order that had been granted on 25 February 1992. Counsel was, however, unable to support his contention by reference to any authority for the proposition that an order of court which was wrongly granted by the court could be lawfully defied. The court rejected that contention.

[9.4] In **Municipal Manager O R Tambo District Municipality v Ndabeni [2022] ZACC 3**, the Constitutional Court reaffirmed the principle that a court order is binding until it is set aside by a competent court and that this necessitates compliance, irrespective of whether the party against whom the order is granted believes it to be a nullity or not. Therefore, failure to comply with such a court order by the Defendant amounts to contempt of court. Now, a party that is dissatisfied with the court order may not adopt an obstinate posture and simply refuse to comply with it simply because he does not like it. He or she or it must approach the court to have such a court order set aside. Finally, this approach was endorsed by the Constitutional Court in the **Economic Freedom Fighters v Speaker, National Assembly and Others 2016 (3) SA 580 (CC)** at paragraph 74, where Mogoeng CJ, as he then was, had the following to say:

*“No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would amount to a licence to self-help. Whether the Public Protector’s decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No*



*binding and unquestionably or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained."*

[9.5] Now, referring to the current matter, the terms of a Settlement Agreement, which have been made an order of court may not be ignored, even if they were made because of iustus error. Once a court has confirmed a Settlement Agreement, like in the present matter, such a Settlement Agreement becomes a court order and once a court order, it became binding on the Defendant until he took steps to have it set aside and it is indeed set aside by a competent court. In the interest of justice and the rule of law, the Defendant is obliged to comply with the court order granted on 21 July 2017. There is an obligation on him to pay the plaintiff 50% of his pension interest calculated as at the date of divorce. The duty is so imposed on him because firstly, he has agreed in the court order that the Plaintiff is entitled to 50% of his pension interest; secondly, he has already received the pension benefits and they are under his control; and finally, no person other than Defendant has an obligation to comply with the court order.

[9.6] Accordingly no merit exists in both contentions by the Defendant as set out in the stated case. In my view, both contentions by the Plaintiff are correct. In the premises, the Defendant must pay the sum of R732582.54 and interest thereon from 21 July 2017 at the legal rate until full payment, to the Plaintiff.

[9.7] With regards to the justus error our courts hold that an error which vitiates the contract must not only be material but must also be reasonable. This requirement of justus error means that a party may not claim the nullity

of a contract based on an error for which he is to blame, in the sense that, by his conduct, he has led the other party to believe that he was binding himself. This is precisely what happened in this case.

**[10] The interpretation and the legal effect of the terms of a clause relating to the division of the pension fund and annuity of the parties contained in the Settlement Agreement concluded by the parties incorporated and incorporated in the Decree of Divorce. the decorative divorce of 21 July 2017.**

[10.1] The issue raised under this point does not need any special attention as it has been fully covered by what is stated in the preceding paragraph [9].

[11] At the hearing of these four points set out above, Counsel for the Plaintiff handed the Court a draft order and asked this Court to make it a court Order. While that was a plausible step, the Court could not then or even now make the draft order a court order as this court lacks the authority to do so. What this court was required to do is circumscribed by the four points it was required to decide. This court was not granted any authority to make any Order upon its findings.

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P M MABUSE

JUDGE OF THE HIGH COURT

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Appearances

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Instructed by

Sambo-Mlahleki Attorneys.

Defendant's Counsel

Adv B R Matlhape

Instructed by

Rammutla-At-Law Inc;

Date of Hearing

5 June 2023

Date of Judgment

22 November 2023