HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 60586/2011

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 26 MAY 2023

SIGNATURE

In the matter between:

JOSINAH MMAPHAKE MORARE Applicant

and

PATRICK MATHETHE MORARE First Respondent

THE GOVERNMENT EMPLOYEE PENSION FUND Second Respondent

Summary: *Application for variation of a divorce order granted more than ten years ago to include an order in terms of section 7(8)(a) of the Divorce Act 70 of 1979 for half of the first respondent's pension interest – insufficient evidence regarding the omission as well as the division of the erstwhile joint estate – in addition, no reasonable explanation for delay justifying a favourable exercise of the court's discretion – application dismissed.*

ORDERS

1. The application is dismissed.

2. Each party to pay her or his own costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] On 26 January 2011, that is more than ten years ago, this court granted the applicant a decree of divorce and ordered the division of the joint estate of her and the current first respondent, to whom she had been married at the time. The applicant now claims a variation of that order in the form of an additional order in terms of section 7(8)(a) of the Divorce Act 70 of 1979 to the effect that one half of the first respondent's pension interest at the time of divorce, be payable to her. The second respondent is the Government Employee Pension Fund (GEPF). The erstwhile spouses are both members of the GEPF.

Brief background

[2] The principal parties were married to each other in community of property on 13 April 2004. By then they had a girl child, who was born on 14 March 2003 and who was, both in practice and in law, treated as minor born of their marriage.

[3] On 25 October 2011 the applicant instituted divorce proceedings against the first respondent. In her particulars of claim she had pleaded that both the spouses had pensionable interests which were, in terms of section 7(7)(a) of the Divorce Act, deemed to form part of the joint estate. The applicant claimed:

> *"(a) An order dissolving the marriage bond existing between the parties;*
>
> *(b) Division of the joint estate;*
>
> *(c) The parental rights and responsibility in respect of the children (sic) be awarded to both parties in terms of section 18(2) of the Childrens Act;*
>
> *(d) Primary resident of the children (sic) be awarded to the Plaintiff in terms of section 18(2) of the Childrens Act;*
>
> *(e) Defendant will have reasonable rights of access to the children (sic) in terms of Section 18(2) of the Childrens Act;*
>
> *(f) Defendant must maintain the child at R 2 500 per month;*
>
> *(g) In terms of Section 7(8) of the Act, the above Honourable Court is entitled to order at the granting of a final order of divorce that:*
>
> *(i) the Plaintiff is entitled to half of the Defendant's pensionable interest in the pension fund of which the Defendant is a member after taxation calculated from date of divorce action;*

(ii) an endorsement be made against the records of the pension fund ... to the effect that half of the Defendant's pensionable interest determined as at date of divorce be paid to the Plaintiff when the Defendant's interest ... accrues ....;

(h) Payment of the sum of R125 00.00 an attachment of the said amount from the Defendant's pension fund;

(i) Costs of suit;

(j) Further and alternative relief".

[4] On 26 January 2012 Kruger AJ in this court and under the same case number as the present application, granted an order in terms of prayers (a) – (f) of the applicant's particulars of claim.

[5] At that time, the action had been defended, but the first respondent had yet to plead or to deliver a counterclaim. No discovery had been made and no records of the actual divorce hearing could be traced.

[6] The first respondent was unrepresented at the time and claims to have attempted to settle the matter with the applicant's then attorneys, to no avail. He claims that the attorneys had been instructed not to make contact with him due to the rush the applicant had been in at the time. The first respondent further claims to only have found out about the divorce order some four months after the date thereof. As the order contained no relief as claimed against his pension interest nor any word of the contested R125 000.00 alleged proceeds of a sale of property, he surmised that the applicant had failed to make out a case for this relief and left it at that. As a result of the subsequent passage of time, he further assumed that the applicant had abandoned any claim to that additional relief.

The present application

[7] On 16 August 2022 the applicant launched her present application. In her Notice of Motion, she claims that the order of Kruger, AJ *"... be varied/amended specifically to include the following: That the 50% share of the First Respondent's pension interest in the Government Employee Pension Fund be paid to the Applicant as at the date of the divorce and the GEPF records be accordingly endorsed for the court to give effect to the defined rights of the parties as envisaged in terms of Section 7(8) of the Divorce Act of 1970 (sic)"*.

[8] The applicant is herself a member of the GEPF, being employed at the Department of Home Affairs. In her founding affidavit, she says nothing about her own pension interest and neither does she give any particulars about the division of the joint estate except to say *"the joint estate has not yet been liquidated and the first respondent is still working for the Department of the South African Police and has been employed by the said department for years ..."*.

[9] The applicant claims that she has a right to one half of the first respondent's pension interest as at date of divorce and that she has never waived nor abandoned that right. In the conclusion of her founding affidavit, the applicant claims that she has *"... a clear right to be paid immediately a 50% share in the pension interest of the first respondent in law in terms of section 7(8) of the Act ..."*.

[10] In respect of the time that has elapsed since the granting of the divorce order and the launching of the application, the applicant stated that she had relied on her erstwhile attorneys *"... to guide her in claiming ..."*, referring to a claim against the GEPF. She continued in her founding affidavit under the heading "Ad Condonation" that she found it hard to get hold of her attorney and, even when visiting his office, could not get hold of him. She stated: *"... for years, I have*

been keeping the hope that someday I'll get hold of them, especially because they started the matter, I wanted them to finalize it for me".

[11] Eventually, in January 2022, she found out from one of her work colleagues who had recently got divorced, that she should go directly to GEPF with her court order, which she did. It was only then that she was told that the GEPF could not assist her due to the absence of a Section 7(8) Divorce Act order.

[12] The period since January 2022 until date of the launch of the application has been explained by the applicant as having been taken up by locating new attorneys, saving up money to give them "financial instructions", consultations and the eventual launch of the application.

[13] The applicant omitted to state that she had launched a similar application in September 2016, which she had withdrawn by notice only in January 2023. The only explanation for this was tendered by her counsel from the bar to the effect that the applicant was "unhappy" with that application and/or the way in which the attorneys had handled it.

The law regarding pension interests in divorce matters

[14] The proper interpretation of Section 7(7) and 7(8)[1] of the Divorce Act have received the attention of the Supreme Court of Appeal in a matter to which neither of the parties' counsel have referred in their otherwise useful heads of argument,

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[1] Sections 7(7) and (8) in their material parts read:

'(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, ...

...

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to have divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

namely *GN v JN*[2]. The facts thereof were fairly similar to the present application, save for the fact that the divorce order had been obtained in the Regional Court and not in the High Court in which the appellant sought declaratory and ancillary orders pertaining to a half share in the respondent's pension interest.

[15] The fact that a divorce order had been granted in a different court from the one hearing the application for further orders as court of first instance, complicated the arguments on appeal in *GN v JN* as Section 7(8)(a) only refer to "the court granting the divorce". This apparent exclusive jurisdiction led to extensive debates as to whether a non-member of a pension fund can post divorce and in another court claim an order as contemplated in section 7(8)(a). This issue and the interpretation of the parties' settlement agreement in *GN v JN* led to a minority judgment of some substance. In the end, only declaratory orders in terms of section 7(7) were granted together with the appointment of a liquidator.

[16] The position in the present matter is different in that this court is the same court that had granted the divorce and what is sought, is a variation of the actual divorce order.

[17] Nevertheless, the Supreme Court of Appeal has, with reference to Van Niekerk[3] and *Old Mutual Life Assurance Co (SA) Ltd v Swemmer*[4] in *GN v JN* determined the legal position to be as follows: A pension interest is not a real asset that is open to division. It is the value that, on date of divorce, is placed on the interest that a party to those proceedings has in the pension benefits that will accrue to him or her at a certain future date in accordance with the rules of a particular fund. Section 7(7)(a) creates, as a peremptory deeming provision, a

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[2] 2017 (1) SA 342 (SCA).
[3] PA van Niekerk, *A practical Guide to Patrimonial Litigation in Divorce Actions*, issue 17 (Sep 2015) at par 7.2.4.1.
[4] 2004 (5) SA 373 (SCA) at 18.

fiction that such a pension interest of a party becomes part of the joint estate which upon divorce is to be shared between the parties[5].

[18] Section 7(8) on the other hand, creates a mechanism whereby a court may oblige a pension fund to pay to a non-member that portion of a pension interest to which such non-member as divorcing spouse may become entitled. The non-member is thereby "*relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest*" and "*... this is as far as section 7(8) goes and no further*"[6].

The law regarding variation of orders

[19] The general principle is that, once a court has pronounced on an issue in a matter before it, it is *functus officio*, meaning that its duties have been discharge, and that it cannot revisit its own order. One of the exceptions to this general rule, is the mechanism provided for in Rule 42 of the Uniform Rules.

[20] In terms of Rule 42(1)(b) a court may, on application to it by an affected party "*... rescind or vary ... an order ... in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission ...*".

[21] The case law[7] and commentary on this Rule[8] also confirm that a court has a discretion to grant relief under this Rule and that it would be a proper exercise of a court's discretion to refuse relief "*... even if the application for variation of an order of court proved that subrule (1) applied, he should not be heard to complain after the lapse of a reasonable time*"[9].

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[5] Par 26
[6] Par 27
[7] *First National Bank Ltd v Van Rensburg NO* 1994 (1) SA 6k77 (T) at 681B-G; *Firestone South Africa (Pty) Ltd v Gentrico AG* 1977 (4) SA 298 (A) at 306H and *Roopnarian v Kamalapathy* 1971 (3) SA 387 (D).
[8] Van Loggenberg, *Erasmus Superior Court Practice*, at D1-562
[9] Ibid

Evaluation: Rule 42

[22] From a reading of the founding affidavit of the applicant and, as confirmed by her counsel in argument, the applicant relies on the aforesaid Rule. For purposes thereof, she relies on and the alleged omission in the order by the absence of an order in terms of Section 7(8)(c) of the Divorce Act. The applicant was silent as to her own pension interest, the division thereof or the "omission" of the prayer wherein she claimed payment of R125 000.00 from the first respondent in the divorce action or even her prayer for costs.

[23] The fact that the learned acting Judge who granted the divorce order, has not granted prayers (g), (h) or (i) claimed by the applicant in her particulars of claim, does not per se amount to an omission. It might equally have been an intentional refusal. In fact, where the applicant chose not to attack the "omission" of the claim of R125 000.00 or the claim for costs, it leads to the inference that the non-granting of those prayers were not "omissions". The inference then seems to become stronger that the fact that the prayer wherein she had claimed a section 7(8) Divorce Act order had not been granted, was also not an "omission". The applicant has produced no evidence on this score. On this basis, the applicant's application should fail.

[24] Even if, on a beneficial interpretation of the circumstances, it should be found that the applicant has bought her application within the ambit of Rule 42(1), there is an unexplained time lapse of more than a decade since the granting of the order and the launching of the application. The applicant tendered scant and unconvincing explanations for this time delay. She stated that, immediately upon the granting of the order, she wanted to proceed with "claiming" against the GEPF. As mentioned earlier, she has explained that she had some difficulties of getting hold of her attorney, but surely after the passage of a year, or two or three or even five years of no contact with him, she must have realized that she needed

to seek alternative help. At no stage did she approach her employer, other attorneys, the GEPF itself or even the first respondent. Only after ten years, when speaking to a co-worker, did she approach the GEPF. It is trite that there is a period for which a lay person may hide behind the inactivity of his or her attorney, but once it became clear that reliance on such an attorney is futile, it is encumbent on a party, even a lay person to take active steps[10]. This is such a case and the applicant is such a delinquent litigant.

[25] There is an additional factor which would militate against exercising a court's discretion in favour of the applicant and this is the uncontested version of the first respondent that he had in the interim and, upon learning that there was no order directly against his pension interest, arranged his retirement plans accordingly.

[26] Even if it could be argued that the inordinate time delay should not be a bar to a claim for an order in terms of Section 7(8)(a) of the Divorce Act, the merits for the granting of such an order has not been established by the applicant: assuming yet again in her favour that the previous joint estate has not yet been finally devided (a claim which the first respondent has not made). The applicant had furnished no evidence as to what the joint estate comprised of. It might or might not be that the assets retained by the parties were of equal value or that the pension benefits of the respective parties were the sole assets. No mention was made by the applicant of the size of her own pension interest and whether that may be equal to, larger or lesser than that of the first respondent. Her failure to disclose this raises suspicions that the position might be that her own pension interest is the largest, hence the lack of disclosure at the risk of having to share it.

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[10] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA 135 (A)

[27] At the risk of repetition, Section 7(7) of the Divorce Act, deems the pension benefits of both the spouses to form part of the joint estate. Upon division of such joint estate, a court may, for purposes of creating a mechanism for such division, make an order for direct payment of a portion of a party's pension benefit to the other, non-member, party. The position is not, as the applicant seems to believe, that she is simply as of right entitled to one half of the first respondent's pension interest as at date of divorce and therefore, as of right entitled to an order in terms of Section 7(8) of the Divorce Act. This is not only wrong in law but would also not be a fair or equal division of the joint estate in the absence of a similar inclusion (and division, if needs be, depending on the manner of division of the joint estate as a whole) of her own pension interest.

[28] In similar circumstances the SCA in *GN v JN* substituted the order of the court a quo by appointing a liquidator to divide the joint estate and by issuing declaratory orders to the effect that the two spouses were respectively entitled to 50% of each other's pension benefits. Had that been what the applicant had claimed in this application (as suggested by the first respondent), such an order or orders could possibly have been granted.

[29] In the circumstances where the applicant has elected to simply seek an order for a claim against the respondents pension interest, without providing any evidence as to whether such an order would reflect a proper division of the erstwhile joint estate, she is not entitled to such relief or, to put it differently, where a court "may" have granted an order in terms of Section 7(8) in appropriate circumstances, this is not such a case and this court exercises its discretion not to grant such an order.

[30] All that remains is the issue of costs. Ordinarily, costs should follow the event. However, it seems that the applicant had been ill-advised on a number of fronts. On the other hand as well, from the first respondent's papers it appears as

if he remained amenable, despite having otherwise arranged his life in the past decade, to participate in a fair and final division of the erstwhile joint estate (including the pension interests of both parties). This is a commendable stance and, in the exercise of my discretion and in order to avoid a winner/loser situation in what appears to be the final convulsions of a stale divorce, I find it fair that each party pays her or his own costs.

Orders

[31] The following is made.

1. The application is dismissed.
2. Each party to pay her or his own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 22 May 2023

Judgment delivered: 26 May 2023

APPEARANCES:

For the Applicant:	Mr N D Malale
Attorney for the Applicant:	Malale Nthapeleng Attorney, Pretoria
For the First Respondent:	Adv D Weyers
Attorney for the first Respondent:	Lombard and Weyers Inc., Pretoria