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

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NUMBER: 3204/2021P

In the matter between:

N P M **PLAINTIFF**

And

M H M **DEFENDANT**

JUDGMENT

P C BEZUIDENHOUT J:

[1] The matter was set down on the trial roll on 22 March 2023. The parties had however prepared a stated case and also heads of argument. It was contended that the matter, as it was crowded out, could be dealt with on the papers with the heads of argument as there is a stated case and it is a point of law which needs to be decided. The matter is therefore dealt with accordingly.

[2] The stated case in terms of Rule 33 appears at page 35 to 41 of the indexed papers. It sets out there would be no oral evidence and that heads of argument would be filed.

[3] The facts are that Plaintiff and Defendant were married to each other on 4 September 1993 in community of property. From the marriage certificate at page 27 of the index papers it appears that Defendant was born during 1966 and Plaintiff during 1969. The parties separated during December 2004 and seized living together as husband and wife from then. Thereafter Plaintiff had an extra marital child. Both parties agreed that the marriage has broken down.

[4] There are two homes and Plaintiff and Defendant each reside in one of these homes. Plaintiff is a member of the Government Employee Pension Fund and Defendant was employed by NAMPAK but was retrenched on 31 January 2016 and then received an amount of R 609 455.14. In terms of the common cause facts the greater portion was used to build the house in which he is residing. The parties intend that each party will retain the home in which they are presently residing.

[5] The question of law in dispute is in terms of what is set out in the summary of facts at page 38 of the indexed papers whether Plaintiff is entitled to 50 % of the pension benefit paid to Defendant upon his retrenchment and secondly whether Defendant is entitled to 50 % of Plaintiff's pension interest with the Government Employees Pension Fund up to date of divorce.

[6] In the particulars of claim Plaintiff sought forfeiture of benefits and the heads of argument deal mainly with this issue. However in the summary of facts it is set out that Plaintiff no longer seeks forfeiture of the patrimonial benefits but contends that she is entitled to 50 % of the pension interest of Defendant and that he is entitled to 50 % of

her pension interest but only up to the date on which they separated. Defendant contends that although they may have separated during December 2004 he is entitled to 50 % of Plaintiff's pension interest up to the date of the divorce. The amount that was received from NAMPAK accrued to the joint estate and was used for building the house in which he resides.

[7] As the stated case sets out the issue which has to be decided in paragraphs 13 and 14 which I have referred to above it is no longer necessary to deal with the issue of forfeiture.

[8] The first issue is whether Plaintiff is entitled to 50 % of the payment that Defendant received on retrenchment during 2016. It is common cause that at that stage they were still married and the marriage in actual fact still subsists up till today. Accordingly the amount that Defendant received on his retrenchment formed part of the joint estate of the parties.

[9] In Ndaba v Ndaba 2017 (1) All SA 33 (SCA) it was held at paragraph 26:

> "The language of section 7(7)(a) of (referring to the Pension Funds Act 24 of 1956) is clear and unequivocal. It vests in the joint estate the pension interest of the members spouse for the purposes of determining the matrimonial benefits, to which the parties are entitled as at date of their divorce. Most significantly, the Legislatures choice of the word 'shall' coupled with the word 'deemed' in section 7(7)(a) is indicative of a peremptory nature of the provision. The section creates a fiction that a pension interest of a party becomes an integral part of a joint estate upon divorce which is to be shared between the parties. Van Niekerk puts if thus:

> ‘Where the parties are married in community of property, the value of the pension interest is added to the value of the other assets that fall in the joint estate for purposes of the division of the estate.’

[10] Therefore the amount which was received by Defendant in 2016 when he was retrenched forms part of the joint estate of the parties as the marriage still subsisted at that time. As appears from what is set out above and which the Supreme Court of Appeal has ruled on it forms part of the joint estate and must be taken into account in the calculation of the value of the joint estate. As the amount has already been paid Plaintiff would be entitled to 50 % thereof but for practical reasons it will be taken together with all the assets in determining what the value of the estate is which is then to be divided equally.

[11] The further question is whether Defendant is entitled to 50 % of Plaintiff’s pension interest as at date of divorce. In the case of Ndaba it was held in paragraph 27:

> “Section 7(8), on the other hand, creates a mechanism in terms of which the pension fund of the members 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 as provided for in section 37 D(1)(d)(i) of the Pension Fund Act 24 of 1956 and section 21(1) of the Government Pension Law 1996.”

[12] In Katz v Katz 1989 (3) SA p 1 (AD) it was held at 6G – I dealing with the issue of redistribution and also maintenance:

> “There is nothing to indicate that the legislature had in mind any date other than the date of the Court’s order and, indeed if original contention of the appellant were to succeed it could give rise to highly anomalous consequences.”

This was referred to and accepted in RP v RP 2016 (4) SA 226 (KZD) at paragraph 55 where it was held as follows:

> "However in Katz Milne J.A. accepted the trial courts finding in respect of the value of the net assets of the appellant at the date of conclusion of the trial and in rejecting the submission on behalf of the appellant that the parties' assets should be determined as at date of separation."

In Government Employees Pension Fund v Naidoo & Another 2006 (6) SA 304 (SCA) it was held at 307H as follows:

> "Prior to the divorce the benefits accrued to the joint estate. It is the only asset in the joint estate. Mrs Naidoo accordingly required an undivided half share in the benefit. On divorce she became entitled to her half share. That is what she claims. In my view such a claim is not precluded by the section."

In the head note of the said decision it sums it up as follows referring to persons married in community of property:

> "Upon divorce a non-member spouse becomes entitled to payment of his or her half share of the benefit and the latter claim is not precluded by the provisions of section 21(1) of the Government Employees Pension Bill 1996."

[13] From what has been set out above it is therefore apparent that Defendant is entitled to 50 % of Plaintiff's pension benefit as at date of divorce. It is not to be calculated from the date of separation but that he is entitled to it when it is calculated at the date of divorce.

[14] The matter must be set down for hearing on the unopposed divorce roll if the parties agree to what has been concluded herein.

[15] The issues which had to be decided in terms of the stated case are accordingly as follows:

1. The retrenchment payment received by Defendant when he was retrenched on 31 January 2016 forms parts of the joint estate and must be taken into consideration in determining the value of the joint estate.

2. Defendant is entitled to 50 % of the pension benefit of Plaintiff with the Government Employees Pension Fund and is to be calculated as at date of divorce.

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P C BEZUIDENHOT J.

JUDGMENT RESERVED ON: **22 MARCH 2023**

JUDGMENT HANDED DOWN ON: **21 APRIL 2023**

COUNSEL FOR PLAINTIFF: **B B DEBEER**

Instructed by: **W A Mpanza Incorporated**

Durban

Ref: Mpanza/D/Ntombikayise Petuna Mlungu/2021

Tel: 083 336 7096

c/o: Fakude & Associates

Pietermaritzburg

COUNSEL FOR DEFENDANT: **N PHAMBUKA**

Instructed by: **Wendy Cele & Associates**

Durban

Ref: WCA/CVL/059

Tel: 031 944 4625/ 071 055 8955

c/o: Myende Attorneys

Pietermaritzburg