

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

REPORTABLE



NORTH WEST HIGH COURT, MAFIKENG

CASE NO. 1819/2011

In the matter between:

M[...] K[...]

APPLICANT

and

G[...] K[...]

1ST RESPONDENT

MR STARBUCK

2ND RESPONDENT

JUDGMENT

GUTTA J.

A. INTRODUCTION

[1] The applicant applied for an order substituting the Receiver and Liquidator (the second respondent) appointed by this Court and for an order that the Government Employee Pension Fund, of which the first respondent is a member, award the applicant 50% of the first

respondent's interest and that the records of the pension fund be endorsed to give effect to the order in terms of which the pension fund interest be paid to the applicant within 60 days from the date of the final order of divorce. The respondent has not filed opposing papers.

B. BACKGROUND

- [2] The applicant and the first respondent divorced in the North Eastern Divorce Court in Pretoria on 08 March 2001. The divorce order included an order that the joint estate be divided. The parties were unable to agree on the division of the assets in the joint estate and on 09 July 2009, this Court granted an order appointing the second respondent as the liquidator with the powers to realise the assets of the joint estate. The powers and duties of the liquidator were embodied in a document which formed part of the order granted.
- [3] The parties met once with the second respondent, who promised to revert to them and who has to date not contacted the parties. Pursuant thereto, the parties attempted to settle and it is alleged by the applicant that there was consensus between the parties that only the immovable property and the pension interest are subject to division. Although a settlement agreement was drafted, the agreement was not signed by the first respondent, whose attorney addressed a letter to the applicant's attorney wherein he claimed other movable property in the joint estate and also disputed the applicant's right to payment of the first respondent's pension interest.

- [4] This court is prepared to grant the order substituting the liquidator, the question considered in this judgment relates solely to whether the applicant is entitled to claim 50% of the first respondent's pension interest after the divorce order was granted.
- [5] Mr Wessels, counsel for the applicant, referred the Court to two conflicting decisions, namely, *Sempapalele v Sempapalele & Another* **2001 (2) SA 306 (O)** and *Maharaj v Maharaj & Others* **2002 (2) SA 648 (D)** and submitted that this court should follow the *Maharaj* decision. In *Sempapalele v Sempapalele & Another supra*, Musi J (as he then was) **at 312G/H-N** held:

"A spouse seeking a share in the pension interest of the other spouse had, in terms of s7(7)(a), to apply for and obtain an appropriate court order during the divorce proceedings. In the present case the applicant failed to obtain a court order awarding her a share in the first respondent's pension interest in terms of s7 of the Act at the hearing of the divorce matter. She could not now get such an order."

- [6] In *Maharaj v Maharaj & Others supra* **at 651**, Magid J did not agree with Musi J and held that:

"If the learned judge intended to hold that, if there is no reference to a spouse 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 . . .

. . . 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 divorce.”

C. THE LAW

[7] Section 7 of the Divorce Act 70 1979 (“the Divorce Act”) provides for the determination of the patrimonial benefits, to which the parties to any divorce action may be entitled:

“DIVISION OF ASSETS AND MAINTENANCE OF PARTIES

(3) A court granting a decree of divorce in respect of a marriage out of community of property—

(a) Entered into before the commencement of the Matrimonial Property Act, 1984, in terms of an antenuptial contract by which community of property, community of profit and loss and accrual sharing in any form are excluded; or

(b) entered into before the commencement of the Marriage and Matrimonial Property Law Amendment Act, 1988, in terms of s 22(6) of the Black Administration Act, 1927 (Act 38 of 1927), as it existed immediately prior to its repeal by the said Marriage and Matrimonial Property Law Amendment Act, 1988, may subject to the provisions of subsections (4), (5) and (6), an application by one of the parties to that marriage, in the absence of any agreement between them regarding the division of their estates, order that such assets, or such part of the assets, of the other party as the court may deem just be transferred to the first-mentioned party.”

“ 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.”

“(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 ss (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) 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;
- (b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party, in respect of that part of the pension interest concerned.”

[8] The above sections must be read in the context of section 37A of the Pension Fund Act 24 of 1956 (the Pension Fund Act) which provides that

“Save to the extent permitted by this [Pension Funds] Act, the Income Tax Act . . . , and the Maintenance Act . . . no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in determination of a judgment debtor’s financial position in terms of section 65 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such

benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.”

D. ANALYSIS

- [9] It is the introductory words of section 7(8) of the Divorce Act that gives the court the power to direct the pension fund to pay or transfer a member’s pension interest to a non-member, notwithstanding section 37A of the Pension Fund Act. The Pension Fund is obliged to comply with such an order of court provided it was granted on the date of divorce. See *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer* **2004 (5) SA 373 SCA**.
- [10] Both *Sempapalele v Sempapalele & Another supra* and *Maharaj v Maharaj & Others supra* are silent on the provision of section 7(8)(a) of the Divorce Act.
- [11] On a strict interpretation of section 7(8)(a) of the Divorce Act, it is apparent that only the court granting a decree of divorce may make an order that a part of the pension interest be paid to a non member. This may be perceived to be unjust as it would deprive a party of their right to a member’s pension interest if such an order was not obtained when the Court granted the divorce, but the Court cannot depart from the literal meaning of Section 7(8)(a) of the Divorce Act.
- [12] As Alexander J in *Ex-parte Randles: in re King v King* **[1998] JOL 2211**

(D) at 15 observed, when responding to a submission from counsel that, ‘The Legislature is not to be perceived as creating unjust or inequitable results, at sanctioning discrimination or inequality, not in favouring of an unjust and inequitable construction where the converse could as easily apply (Cf *LAWSA* vol 25, para 284 pp 246-248)’ held that:

“These presumptions must yield however to the language of an enactment if otherwise clear in its impact. Corbett JA in *Summit Industrial Corporation v Claimants against the Fund comprising the Proceeds of the Sale of the MV Jade Transporter* 1987 (2) 583 (A) at 596I *et seq* outlined the approach that should be followed:

‘As has been remarked in various judgments, it is dangerous to speculate on the intention of the Legislature (see eg the reference in *Savage v Commission for Inland Revenue* 1951 (4) SA 400 (A) at 409A) and the Court should be cautious about thus departing from the literal meaning of the words of statute (see remarks of SOMON JA in *Dadoo Ltd and Others v Krugersdorp Municipal Council* 1920 AD 530 at 554-5). It should only do so where the contrary legislative intent is clear and indubitable (see *Du Plessis v Joubert* 1961 (1) SA 585 at 594-5). Moreover, it is not the function of the Court to supplement a statutory provision in order to provide for a *casus omissus* (see *Walker v Carlton Hotels (SA) Ltd* 1946 AD 321 at 330; *Barkett’s case supra* at 363F-G).’ ”

[13] In an article titled “*Divorce Orders and Pension Benefits*” by Giselle Gould, which is written as an appeal from the Institute of Retirement Funds to legal practitioners, she states that ‘the effect of the enactment of the Divorce Amendment Act 7 of 1989 is that:

“Even if, in terms of Section 7, the pension interest of one of the parties is deemed to be part of his assets, this does not mean that a pension fund is required or even permitted to reduce the pension benefit of a member in order to pay a share of it to the non-member spouse **other than in terms of a court order made at the time of divorce**. If a Court by order does not specifically instruct a fund to pay to a non-member spouse a share of the member’s pension interest in terms of Section 7(8) of the Divorce Act, the fund may not do

so and the non-member spouse has recourse only against the member spouse.”
(Own emphasis)

[14] Hence only a court order granting a decree of divorce can order the Pension Fund to pay a part of the member’s interest on the date of divorce. Any other court order pursuant to the divorce which directs the pension fund to pay a non member a part of a member’s interest is in conflict with the section 37A of the Pension Fund Act and does not fall within the protective ambit of section 7(8)(a) of the Divorce Act. See *Lamb & Another v Lamb & Others* **2002 JDR 0463 (T) unreported** where the Court **at page 13** held that:

“It is unfortunately clear that this court cannot grant the relief sought in prayers 2 and 3. Section 7(8) of the Divorce Act gives the court the power to make such orders when granting a decree of divorce. It is now some seven years later. Counsel for the applicant was not able to refer to any section in the Divorce Act or any common-law rule or decided case which would support the grant of the relief. A further problem is that granting such relief would be in effect an amendment of the order made on 15 July 1995 and no case for an amendment has been made out in the papers. In so far as the relief sought could be construed as giving effect to the liquidation and distribution account it is clear that the first applicant has not received the right, title and interest in and to the policies.”

[15] A liquidator does not have the powers to transfer, reduce or cede any pension benefits, as this would be in conflict with Section 37A of the Pension Fund Act. As Southwood J in *Lamb & Another v Lamb & Others supra* **at page 16** stated:

“This is expressly prohibited by the provisions of section 37A(1) of the Pension Fund Act.”

[16] The Court may, on the date of divorce, appoint a liquidator with the power to determine the value of the plaintiff's pension interest for purposes of division of the joint estate. See *Ex-parte Randles: in re King v King supra*.

[17] To enforce a claim for pension interest, the following is required in the court order on the date of divorce:

17.1 the pension fund must be named in the order or agreement;

17.2 the order or agreement must be clear in respect of exactly which portion of the interest is to be transferred, alternatively that the liquidator is to be appointed to determine the pension interest;

17.3 the pension fund must be directed to make an endorsement in the records of the fund that part of the pension interest concerned is so payable to that other party.

See Section 7(8)(a)(ii) of the Divorce Act.

[18] The Supreme Court of Appeal in *Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer supra* **at paragraph [26]** held that:

"[26] This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of ss 7(7) and 7(8) of the Act. If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order,

without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings.”

- [19] In *casu*, the applicant did not claim payment of the first respondent’s pension interest in the summons and the liquidator that was appointed by the court after the divorce had no powers in so far as the pension interest is concerned.
- [20] Where the parties after the date of divorce enter into an agreement concerning the pension interest or appoint a liquidator with the powers to determine the value of the pension interest for purposes of division, this is done at the parties’ own peril as it is in conflict with Section 37A of the Pension Fund Act and in those circumstances where the pension fund refuses to give effect to an agreement after the divorce order was granted, the parties may seek recourse against each other.
- [21] For reasons stated *supra*, the applicant is not entitled to an order directing the Government Employees Pension Fund to pay 50% of the first respondent’s pension interest to the applicant.
- [22] Further, as in *Sempapalele v Sempapalele & Another supra*, the applicant in *casu* also fails on another ground, namely that, the value of the respondent’s pension interest at the time of the divorce in 2001 is not known and no information was placed before to the Court to ascertain the value thereof.
- [23] A further ground for refusal is the reason uttered by Majid J in *Maharaj*

v Maharaj & Others supra at **651F/G - 652C-C/D**, that “the applicant was however not entitled to payment of the amount due to her until the joint estate has been divided. That had not yet occurred.”

E. THE ORDER

[24] In the circumstances, the following order is granted:

- a) Mr Starbuck is removed as the Receiver and Liquidator and substituted with Mr Cornelius Mosito as the Receiver and Liquidator in the joint estate, subsisting between the applicant and the first respondent, with full powers to:
 - (i) realise the whole of the joint estate in accordance with the duties and powers conferred on him in Annexure “X” and to be exempted from furnishing security for the proper performance of his duties as Liquidator;
 - (ii) receive, liquidate and distribute the assets in the joint estate according to the law with full powers to divide/distribute the joint estate;
 - (iii) institute legal proceedings against any person for the delivery to him/her of any assets, deed of document which vests in the estate, in whatever Court it shall be appropriate to bring such proceedings;
 - (iv) instruct and appoint attorneys and/or counsel to institute proceedings on her/his behalf for the purpose of obtaining delivery of any assets alleged to vest in the joint estate and to claim such alternative relief as the circumstances may require;
 - (v) sell and dispose of any assets of whatever nature, movable or immovable, corporeal or incorporeal of whatever nature that comprise the joint estate either by private treaty, public auction tender or such manner as he may deem fit

under such terms or conditions as he may deem fit;

- (vi) sign and execute documents, deeds or any other papers that may be necessary to effect transfer of any of the assets or properties in the joint estate to whoever may acquire same from the receiver and liquidator.

N. GUTTA
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 02 AUGUST 2012
DATE OF JUDGMENT : 16 AUGUST 2012

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