

# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable  
Case no: 32/05

In the matter between:

GOVERNMENT EMPLOYEES PENSION FUND

Appellant

and

JANE NAIDOO  
SIVANAUNDAN NAIDOO

1<sup>ST</sup> Respondent  
2<sup>ND</sup> Respondent

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Coram : SCOTT, NAVSA, MTHIYANE, LEWIS JJA  
et MAYA AJA

Date of Hearing : 17 November 2005

Date of delivery : 28 November 2005

Summary: Interpretation of s 21(1) of Government Employees Pension Law 1996 – wife married in community of property in circumstances of the case entitled on divorce to recover from the pension fund her share of husband’s pension benefit

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*JUDGMENT*

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SCOTT JA/...

SCOTT JA:

[1] The respondents in this appeal were formerly married. Their marriage, which was in community of property, was dissolved in the Durban High Court on 7 May 2004. The first respondent (Mrs Naidoo) was the plaintiff in the divorce proceedings. The second respondent (Mr Naidoo) did not oppose them. The order granted in Mrs Naidoo's favour included the following:

- '(d) That the Plaintiff is entitled in terms of Sections 7(7)(a) and 7(8)(a)(i) of the Divorce Act No 70 of 1979 (hereinafter referred to as the said Act) to a one half share of the Defendant's interest in and to the Defendant's Pension Fund by virtue of his employment with the KwaZulu-Natal Provincial Administration (hereinafter referred to as the said Fund) calculated at the date of divorce between the parties but payable when the benefits of the said Fund accrue to the Defendant.
- (e) That the Manager of the said fund is directed to endorse its records in terms of Section 7(8)(a)(ii) of the said Act to reflect the Plaintiff's right as aforesaid in and to the Defendant's interest in the said Fund;
- (f) That in terms of Section 7(8)(a)(i) of the said Act the said Fund and/or the Defendant shall pay to the Plaintiff one half of the value of the Defendant's interest in and to the said Fund calculated at the date of divorce but payable when the benefits thereof accrue to the Defendant.'

The orders in terms of these paragraphs were granted *per incuriam*. Subsections 7(7) and 7(8) of the Divorce Act 70 of 1979 are concerned with pension benefits which have not yet accrued to the member spouse. In so far as is relevant the subsections 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, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce –

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) . . . .'

'7(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 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) . . . .'

'Pension interest', in turn, is defined in s 1(1) of the Divorce Act as follows:

"Pension interest", in relation to a party to a divorce action 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 his office;

(b) . . . .'

What these provisions envisage is an award to the non-member spouse of any part of the member spouse's 'interest' calculated as at

the date of the divorce but with effect from some time in the future when the pension benefit accrues to the member spouse. (Cf *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) para 18.) Once the pension benefit has accrued the provisions of ss 7(7) and 7(8) are no longer applicable. See *De Kock v Jacobson* 1999 (4) SA 346 (W) at 349F-G. In the present case, Mr Naidoo resigned from his post at the Clairwood Hospital in February 2004. By reason of his resignation he ceased to be a member of the appellant ('the fund'). See rule 5.2.2 of the Funds Rules contained in the First Schedule to the Government Employers Pension Law, 1996. His pension benefit thereupon accrued to the joint estate of himself and his wife. An order in terms of ss 7(7) and 7(8) of the Divorce Act was accordingly no longer competent.

[2] There was some dispute as to the circumstances in which the terms of the order relating to Mr Naidoo's pension interest came to be granted. It is unnecessary to resolve it. What is common cause is that in a letter dated 6 May 2004 (the day before the divorce) addressed by the fund to Mrs Naidoo's attorneys, the latter were informed that the fund had no objection to an order being made in terms of s 7(8) provided Mr Naidoo was still a contributing member of the fund at the

date of divorce. The significance of the proviso appears, however, not to have been appreciated and the order was granted.

[3] The fund failed to comply with paragraphs (d), (e) and (f) of the divorce order, contending that they were unenforceable. On 8 June 2004 Mrs Naidoo applied ex parte for, and was granted, an order in the form of a *rule nisi* which, shortly stated:

(a)(i) directed Mr Naidoo to do all things necessary to comply with the administrative requirements of the fund to facilitate payment;

(ii) restrained and interdicted him from receiving from the fund

Mrs Naidoo's 'interest in the proceeds from the fund'.

(b)(i) interdicted the fund from paying Mrs Naidoo's interest in the proceeds from the fund to Mr Naidoo, and

(ii) directed the fund to pay Mrs Naidoo's interest in the proceeds to Mrs Naidoo's attorneys on her behalf.

Mr Naidoo filed no opposing papers and on the extended return day the court *a quo* was informed that the dispute between Mr and Mrs Naidoo had 'by and large been resolved'. We were informed by

counsel for the fund that Mr Naidoo was present in court at the time. The fund, on the other hand, opposed the order sought against it. In an answering affidavit it was pointed out that for the reasons already mentioned the order in terms of s 7(8) of the Divorce Act was granted in error and was unenforceable. It was also contended that the fund was precluded from paying any part of the pension benefit to Mrs Naidoo by reason of the provisions of s 21(a) of the Government Employees Pension Law 1996. There was no suggestion that the benefit was subject to a deduction in terms of s 7(7)(b) of the Divorce Act or any other permissible claim.

[4] Mrs Naidoo did not dispute that Mr Naidoo had left his employment before the divorce and that his pension benefit had accrued to the joint estate. However, she stressed both in her founding and replying affidavits that the pension benefit was the only asset in the joint estate which, by reason of the divorce, had to be divided equally between herself and Mr Naidoo. Neither the fund nor Mr Naidoo contested this allegation. As far as the need for the order against the fund was concerned, she said that Mr Naidoo was not only secretive regarding his pension benefit but had repeatedly told her that he would make her 'suffer'.

[5] The court *a quo* (Jappie J) found on the facts that were common cause that on divorce Mrs Naidoo became entitled to half of the pension benefit and rejected the fund's contention that it was precluded by s 21(1) of the Government Employees Pension Law from paying her half share to her. The *rule nisi* in so far as it related to the fund was accordingly made final. The appeal is with the leave of the court *a quo*.

[6] Mrs Naidoo elected to abide the decision of this court and there was accordingly no appearance on her behalf. There was also no appearance on behalf of Mr Naidoo who in pursuance of the settlement with Mrs Naidoo took no further part in the proceedings. The issue in this court was ultimately the proper interpretation of s 21(1) of the Government Employees Pension Law. Counsel for the fund argued that it precluded payment to Mrs Naidoo and that the court *a quo* had erred in holding the contrary. The section reads:

'(1) No benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act, 1998, and section 7(8) of the Divorce Act, 1979 (Act 70 of 1979), be liable to



be attached or subjected to any form of execution under a judgment or order of a court of law.'

[7] It will be observed that the section covers two situations. First, it prohibits the 'benefit or right' from 'being assigned or transferred or otherwise ceded or of being pledged or hypothecated'. The object, no doubt, is to prohibit a member from himself dealing with the benefit in the manner contemplated. (Section 21(2) provides that if he does, the fund may withhold payment.) But nothing like this arises in the present case. Secondly, the section seeks to protect the benefit against the creditors of the member. The benefit may not be 'attached or subject to any form of execution under a judgment or order of a court of law'. It is this second leg of the section that counsel contends precluded the court *a quo* from making the order it did. But Mrs Naidoo is not a creditor seeking to attach, or execute a judgment against, the benefit as one would an asset in Mr Naidoo's estate. Prior to the divorce the benefit accrued to the joint estate. It is the only asset in the joint estate. Mrs Naidoo accordingly acquired 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. Nor, I should add, could Mr Naidoo

have cause for complaint if the fund pays Mrs Naidoo her half share. He was joined as a party and was aware of the relief sought against the fund, yet he chose to settle the claim in so far as relief was claimed against him and ignore the relief claimed against the fund, notwithstanding his interest in the latter.

[8] The appeal is accordingly dismissed.

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**D G SCOTT**  
**JUDGE OF APPEAL**

**CONCUR**

**NAVSA            JA**

**MTHIYANEJA**

**LEWIS            JA**

**MAYA            AJA**

