

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: A143/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

A[....] C[....]K[....]

Appellant

and

F[....] K[....]

Respondent

CORAM:

LOUBSER, J *et* DANISO, J *et* LITHEKO, AJ

HEARD ON:

13 JUNE 2022

JUDGMENT BY:

LOUBSER, J

DELIVERED ON:

28 JULY 2022

[1] This is an appeal against the judgement of a single Judge sitting in this Division. The judgement appealed against, followed in the wake of another judgement by Murray, AJ a few years earlier in the divorce action between the parties. The judgement now under appeal, concerned a correct interpretation of the judgement delivered by Murray, AJ. The Appellant was granted leave to appeal against the later judgement since it appeared to the Court hearing the leave application that the earlier judgement was not correctly interpreted in the later judgement as far as a singular crucial question was concerned.

[2] That single question forms the subject-matter in the present appeal. The question is whether half of the Respondent's pension fund, which was awarded to the Appellant in the divorce action, ought to be considered as an asset of the Appellant in the computation of the accrual of the estates of the respective parties. In this respect the judgement of Murray, AJ in the divorce action becomes relevant because that judgement was not taken on appeal by any of the parties and because the judgement became the focus point of the later proceedings that are now under appeal.

[3] The background facts are the following: In a comprehensive judgement handed down in July 2015, Murray, AJ made a number of orders, of which I quote only those that are relevant to the present enquiry. The judgement was in Afrikaans, and the orders so quoted are based on a loose translation thereof. The relevant orders are the following:

“1. A decree of divorce is granted.

6. The Defendant (present Respondent) is ordered to pay to the Plaintiff maintenance in the amount of R7 500.00 per month for a period of 5 years from the date of divorce, the first payment to be made before or on 1 August 2015, and thereafter before or on the first day of every subsequent month.

8. The Plaintiff is entitled to share in the accrual in accordance with the provisions of the Matrimonial Property Act 88 of 1984, the amount calculated as on date of divorce to be agreed between the parties within 14 days after date of divorce, failing which the parties are granted leave to approach this Court for the appointment of a receiver with the necessary rights and competency to determine the accrual.

9. The Plaintiff is entitled to 50% of the Defendant's pension interest in the Eskom Pension and Provident Fund as on date of divorce. The Defendant is ordered to inform the Eskom Pension and Provident Fund accordingly and to request it to make such an entry in their records.”

[4] Some five years later the abovementioned Defendant, Mr. K[...], issued summons against Mrs. K[...] to recoup monies allegedly accruing to him pursuant to the dissolution of their marriage. It transpired that Mrs. K[...], the Defendant in that action, had received an amount of R1 944 036.36 as the 50% pension interest of Mr. K[...] as per the Court Order of Murray, AJ. Mr. K[...] contended in that action that this payment formed an asset transferred to the estate of the Defendant and that it had to be taken into consideration when calculating the accrual, which was the only outstanding issue post-divorce. The Defendant, on the other hand, contended that the payment so received was meant to be maintenance for herself, because she had asked for lifelong maintenance in the divorce action, but the Court awarded her only maintenance of R7 500.00 per month for 5 years.

[5] The learned Acting Judge hearing this action instituted by Mr. K[...] interpreted the judgment handed down by Murray, AJ, and came to the conclusion that in the judgment, the anticipated amount (the 50% of the pension interest) was meant to be utilized by the Defendant as an asset that was transferred to her estate and “stand to be utilized in the mathematical calculation of the accrual”. The learned Acting Judge then ordered the Defendant to pay the amount of R 417 000.00 plus interest to Mrs. K[...] as a consequence. The present appeal lies against this finding of the learned Acting Judge.

[6] Consequently, this Court of Appeal has to interpret the judgment of Murray, AJ to establish whether the second judgment incorrectly interpreted same. Again, a loose translation of certain passages in the judgment of Murray, AJ will be used in this process.

[7] The first indication of what Murray, AJ meant, is to be found in the orders she made. Paragraph 8 of the order reads that “the Plaintiff is entitled to share in the accrual in accordance with the provisions of the Matrimonial Property Act 88 of 1984, the amount calculated as on date of divorce...” This part of the order corresponds with Section 3(1) and (2), read with Section 4(1) of the said Act, which provides that the accrual of a spouse’s estate is the amount with which the net value of his estate at the time of the dissolution of the marriage exceeds the net value of the estate at the time of the conclusion of the marriage. It needs to be noted that on the day of the divorce order, the accrual still had to be calculated and determined, and the same counts for the 50% pension interest. The effect thereof is that, at the dissolution of the marriage, the 50% pension interest had not formed part of the net value of the Plaintiff’s estate, strictly speaking. Of further significance is the fact that the order relating to the pension fund was made after the dissolution of the marriage had taken place. It could therefore not form part of the Plaintiff’s estate for purposes of the accrual.

[8] In the judgment itself, Murray, AJ had the following to say in paragraph 103 thereof: “In the present matter... the Plaintiff is in my view clearly entitled to share in the accrual as calculated on date of divorce. The Plaintiff is entitled to what is due to her over and above the 50% of the Defendant’s pension interest if it should transpire at the calculation of the accrual as on date of divorce that she is entitled to further amounts in terms of Section 3 of the Matrimonial Property Act.”

[9] Upon a proper interpretation of the Murray judgment, therefore, I have no doubt that the learned Acting Judge was of the view that the accrual had to be calculated as it appeared to be at the dissolution of the marriage, and that the later payment of the 50% pension interest would not form part of the calculation, as being an asset in the estate of the Plaintiff. As already indicated, the Court *a quo* hearing the action instituted by Mr. K[...], found differently.

[10] It also needs mentioning that Murray, AJ in her judgment found support for her views in the cases of *JA v DA*¹, *Reeder v Softline Ltd and Another*² and *Le Roux v Le Roux*³. In those cases, it was found that upon a correct interpretation of Sections 2 and 3 of the Matrimonial Property Act, the only relevant date for the calculation of the accrual is indeed the date of the dissolution of the marriage.

[11] There are further indications that Murray, AJ never envisaged that the 50% pension interest was meant to become an asset in the estate of Mrs. K[...] for purposes of the mathematical calculation of the accrual. In my view, Murray, AJ clearly indicated that the 50% pension interest was rather meant to provide for her maintenance for the rest of her life. The following passages in her Judgment are relevant in this respect:

Par 5: “The Divorce Act bestows upon a Court in terms of Section 7(2) thereof a general discretion to make a reasonable maintenance order or not to grant any maintenance at all. It also granted the Court a discretion to award rehabilitative or so-called “overbridging” maintenance for a specific period or only conditional upon the happening of a specific event.”

Par 54: “...it would clearly be in the interest of the Plaintiff as a non-member spouse to rather cause her 50% share in the Defendant’s pension interest to be transformed to another approved fund to supplement her own pension interest. (55) This, however, still does not solve her monthly deficit. Mr. De Wet pointed out that Plaintiff would only at age 55 be entitled to withdraw one-third of the investment... In the absence of a maintenance order, any proven shortfall in maintenance will necessarily continue for the next 5 years.”

Par 63: “In the present case, the Defendant refuses to pay maintenance to the Plaintiff.....”

¹ 2014 (6) SA 233 (GJ)

² 2001 (2) SA 844 (W)

³ 2010 JOL 26003 (NCK)

Par 91: "I am further satisfied that, if the payment of maintenance is limited to 5 years, it will allow the Plaintiff to get on her feet again and to limit her shortages until such time as she would be able to withdraw a third of her investment in order to earn interest-income from it...."

[12] Having regard to these passages, there can in my view be no doubt that Murray, AJ considered the 50% pension interest as a means to provide the Plaintiff with maintenance after the initial period of 5 years. The reason why she dealt with this aspect in some detail, is also clear. She was no doubt called upon to do so, since in his Amended Particulars of Claim in the action that he instituted pursuant to the Judgment of Murray, AJ, Mr. K[....] pleaded as follows in paragraph 14 thereof: "During the trial of the divorce action instituted by Defendant.... Plaintiff consented to the Court making an order that Defendant is entitled to 50% of Plaintiff's interest in his Eskom Pension Fund as a date of divorce, the purpose of such consent being that the realization of such pension interest should be taken into account in respect of Defendant's "existing or prospective means" and "financial needs" for purposes of determination of maintenance as contemplated by Section 7 of the Divorce Act 70 of 1979."

[13] In addition, it appears from the transcribed record of the proceedings in the Court *a quo* that Mr. K[....] had testified under oath as follows: "My Lady, I testified ... it is a long time back, but I testified that the maintenance or the pension 50% of the pension fund could be utilized by the Plaintiff it is my ex-wife at this stage to sustain herself financially, yes."

[14] Notwithstanding, it was found by the Court *a quo* that "I find nothing in the interpretation of the Judgment that could be read to say that the anticipated amount was meant to be utilized by the Defendant for her maintenance other than as an asset that was transferred to her estate and stand to be utilized in the mathematical calculation of the accrual". As shown above, this finding of the Court *a quo* is not founded upon a proper interpretation of the Judgment of Murray, AJ. She had clearly earmarked the 50% pension fund for maintenance. Had the Court *a quo* interpreted the Judgment correctly, it would have realized that by ordering Mrs. K[....] to pay a

huge amount to Mr. K[...], it was in fact compromising her maintenance to a large extent.

[15] In the premises, I find that the 50 % of the Respondent's pension fund awarded to the Appellant in the divorce action, cannot be considered to be an asset of the Appellant in the computation of the accrual of the estates of the respective parties. As a consequence, the following orders are made:

1. The appeal is upheld with costs.
2. The order of the Court a quo is set aside and substituted by the following:

2.1. The Plaintiff's claim against the Defendant is dismissed with costs.

P. J. LOUBSER, J

I concur:

N. S. DANISO, J

I concur:

M. S. LITHEKO, AJ

For the Appellant:

Instructed by:

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