THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: A54 / 2020

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

18 FEBRUARY 2022

In the matter between:

B[....] H[....] **APPELLANT**

and

C[....] T[....] M[....] **RESPONDENT**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 FEBRUARY 2022.

J U D G M E N T

RATSHIBVUMO J:

[1] Introduction.

This is an appeal against an order made by Mhala Regional Court (court *a quo*) in a judgment handed down on 22 July 2020. In that judgment, following a trial in a divorce action, the court *a quo* ordered that "pension interest held by the defendant under pension number 96956170 with Government Employees Pension Fund (the GEPF) for the period 02 February 2013 till date of divorce, to be paid to the defendant within 60 (sixty) days from the date of divorce." The Appellant (the Defendant in the court *a quo*) appeals against the part of order that prescribes the date on which the pension calculations should commence, being 02 February 2013 (the date found by the court a quo as the date of the marriage between the parties). The Appellant contends that the order should have been that '50% of the pension interest as at the date of divorce should be paid to the Appellant.' The appeal is opposed by the Respondent.

[2] **Background**.

The Appellant had issued divorce summons against the Respondent at the Mhala Regional Court. According to the particulars of claim, she was in a customary marriage with the Respondent with effect from 02 February 2013. Undisputed evidence led before the court was that she and the Respondent had been staying together since 2004 and have two children; a boy born on 09 May 2009 and a girl born on 27 May 2013. She claimed *inter alia*, for an order in terms of sections 7(8) of Act 70 of 1979 in terms of which the GEPF is ordered to pay an amount equal to the net worth of Respondent's interest before tax and at the date of divorce to the Appellant within 60 (sixty) days of the date of divorce.

[3] The matter went through the trial because the Respondent disputed the existence of a marriage between him and the Appellant. A number of witnesses were called by the Appellant and the Respondent after which, the court *a quo* found that there was indeed a valid customary marriage between the Appellant and the Respondent. Prior to handing down the judgment, the court *a quo* invited the parties to also address it on the date on which the pension calculations would commence. The Respondent grabbed the opportunity to argue that the pension interest should be calculated from the date of marriage. The Appellant was opposed to this as per the heads of arguments presented before the court.

[4] The law.

The authority of the court to order the division of the pension interest is derived from section 7(7) and 7(8) of the Divorce Act, no. 70 of 1979 (the Act) which provides,

> "(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 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) the registrar of the court in question forthwith notify the fund concerned that 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 and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;
>
> (*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."

[5] In *Ndaba v Ndaba*[1], the Supreme Court of Appeal (the SCA) had to answer a question on whether the parties were entitled to each other pension's interest where the settlement agreement made an order of court was silent on the division of the pension. The SCA held the following,

> "it would be inimical to the scheme and purpose of s 7(7)*(a)* if it only applies if the court granting a divorce makes a declaration that in the determination

[1] 2017 (1) SA 342 (SCA) para 25.

of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party shall be deemed to be part of his or her assets. The grant of such a declaration would amount to no more than simply echoing what s 7(7)*(a)* decrees. For the same reasons it was not necessary for the parties in this case, to mention in their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed, would be shared equally between them."[2]

[6] The relevance of the above is to demonstrate that the pension interest form part of the joint estate when parties are married in community of property. There was no dispute in respect thereto before the court *a quo*. There is therefore no doubt that an order limiting the calculation of the pension interest benefit to a date much later than the pension interest started accruing in the pension fund, deprived the Appellant of a share she otherwise was entitled to as part of the joint estate. The question before us is therefore whether the court *a quo* had the authority to determine the date of marriage as the date from which the pension interest should be calculated. In my view, there are two scenarios through which the court would have the discretion to make such an order. The first would be when forfeiture order is made in terms of section 9 of the Act and second would be when a court determines the accrual calculation.

[7] Section 9 of the Act provides,

> "9. Forfeiture of patrimonial benefits of marriage.—(1) When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

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[2] See also *CM v EM* 2020 (5) SA 49 (SCA) which confirms the principle that pensions interest forms part of the joint estate in marriages in community of property.

[8] In the heads of argument, the Respondent conceded that the only source of authority the court *a quo* could have used in making the order as it did, would be would be the above section. This section that empowers a court to order forfeiture of benefits. The Respondent argued though, that the court's discretion should be exercised judiciously as was done by the court *a quo*. While section 9 above empowers a court to make a forfeiture order (which it ultimately did without using those specific words), that was not the case pleaded before the court. In other words, the Respondent did not claim forfeiture of benefits against the Appellant. The case before the court was whether there was a customary marriage between the parties. If the court was to find that there was such a marriage, it would mean that they were married in community of property.[3]

[9] The argument that the court *a quo* exercised its discretion judiciously cannot stand in the circumstances were such an order is granted without any consideration of factors that the Act provides that they should be considered. These would be 'the duration of the marriage, the circumstances which gave rise to the break-down and any substantial misconduct on the part of either of the parties,' These factors were not placed before the court as none of the litigants asked for the forfeiture of benefits order. To make an order for forfeiture of benefits where none is asked for would be a misdirection, entitling the court of appeal to interfere. Without any misdirection on the part of the trial court, the court of appeal is not entitled to interfere with its findings.[4]

[10] The question about the date from which the pension interest should be calculated was raised for the first time by the presiding officer when the parties' legal representatives were making closing arguments. Prior to it being raised as such, it was not pleaded by any of the parties. As indicated above, the wording of the order by the court *a quo*, resembles what one would have expected as an order in marriage out of community of property in which the accrual system applies, in that it

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[3] See section 7(2) of the Recognition of Customary Marriages Act, no. 120 of 1998 which provides, "(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage." This Act came into operation on 15 November 2000.

[4] See *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA).

is the only legal provision from which a calculation of any contribution into one's estate is calculated from the date of marriage.[5]

[11] I am therefore satisfied that there is no legal basis upon which the court ordered that the pension interest be calculated from the date of marriage. I am also satisfied that in so doing, the Appellant was denied a fair share of what she is entitled to benefit as she was married in community of property.

[12] For these reasons, I would propose the following order:

[12.1] Appeal is upheld with costs.
[12.2] Paragraph 4 of the order of the court *a quo* is set aside and replaced with the following:
[12.3] Pension interest held by the Defendant under pension no. 96956170 with the Government Employees Pension Fund, calculated up to the date of divorce to be paid to the Plaintiff.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

MF LEGODI
JUDGE PRESIDENT
MPUMALANGA DIVISION OF THE HIGH COURT

[5] See section 4 of the Matrimonial Property Act which provides,
"4. Accrual of estate.—(1) (*a*) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage."

FOR THE APPELLANT:	**: MS. S THOBELA**
INSTRUCTED BY	**: THOBELA SINDY ATTORNEYS**
	: NELSPRUIT
FOR THE RESPONDENT	**: NO APPEARANCE**
DATE HEARD	**: 28 JANUARY 2022**
JUDGMENT DELIVERED	**: 18 FEBRUARY 2022**