REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHER JUDGES: ~~YES/~~NO
(3) REVISED

CASE NO: 5058/2019

In the matter between:

S[….] W[….] S[….]	**APPLICANT**
And	
NEDBANK LIMITED	**FIRST RESPONDENT**
M[….] D[….] S[….]	**SECOND RESPONDENT**

JUDGMENT

MULLER J:

[1] The facts in this application are relatively simple. The applicant and the second respondent were married to each other, in community of property. The applicant instituted divorce proceedings in the Regional Court against the second respondent, who at the time, was a member of the South African Police Service who contributed to the Government Employment Pension Fund.[1] The second respondent is the holder of an account with NEDBANK, the first respondent.

[2] The second respondent resigned from his employment in December 2018.

Upon his resignation the second respondent became entitled to the pension benefit held by the GEPF.

[3] The attorneys of the applicants were informed on 26 March 2019 that the second respondent's pension benefit of R2 528 038.03 will be paid into second respondent's account held with the first respondent. The applicant applied on an urgent basis to interdict the second respondent, pending finalization of the divorce, to withdraw 50% of the amount of the pension benefit which was paid into his account. A rule *nisi* **was** granted and which was confirmed on 4 June 2019 without any opposition from the second respondent.

[4] The first respondent was ordered to retain and/or preserve 50% of the funds received from the GEPF in favour of the second respondent and to hold the funds pending the finalization of the divorce action.

[5] On 2 July 2019 the Regional Court at Polokwane issued a decree of divorce and also ordered division of the joint estate.

[6] The applicant forwarded the court order to the first respondent and demanded payment of the amount of R1 264 019.02, being 50% of the pension benefit which was paid into the account of the second respondent. The first respondent refused.

[7] The first respondent refused on the ground that the court order made no reference to an amount which either respondent has to pay to the applicant. The first respondent held the position that it needed the consent of the second respondent to release the funds.

[8] Correspondence between the attorney and the first respondent followed with no meaningful results. The applicant then launched the present application in which she claimed an order against the first respondent to transfer and/or pay the amount of R1 264 019.02 to her, together with the costs of the application, on the scale as between attorney and client.

[9] The second respondent did not oppose the application. No relief is claimed against him. It is of no real surprise that first respondent opposed

---

[1] Hereinafter "the GEPF".

the application and in particular, the first respondent opposed the punitive costs order. The first respondent maintained that unless the divorce order states that the applicant is entitled to a specific amount, she is not entitled to payment of any amount from the first respondent, much less, the amount of R1 264 019.02. The first respondent asserted that the applicant has failed to make out a case why she is entitled to the amount claimed or how, if at all, the amount was calculated, as at the date of the divorce. Counsel argued that the first respondent is not a party to the divorce and was dragged into the fray by the order that the applicant seeks against it.

[10] It was put to Counsel for the applicant that the order the applicant seeks is against the first respondent exclusively, with no reference to the account of the second respondent where the funds are preserved. The first respondent's involvement goes no further than being the bank where the second respondent has an account. Counsel conceded that the order is not clear but submitted that the court may amend the order so that the first respondent be ordered pay the amount from the bank account of the second respondent.

[11] Counsel for the applicant argued that the provisions of section 7(7) and 7(8) of the Divorce Act[2] do not find application, as when the application was launched there was no pension benefit held by the GEPF. It is also submitted that in terms of the order for the division of the estate, the 50% of the funds held in terms of the interim order accrued to the applicant.

[12] For a proper understanding of the application, it important to note that it is not the case of the applicant that the joint state had already been divided. It is therefore accepted that since the divorce order was granted the joint estate has not been divided.

[13] Division of the joint estate may be brought about by agreement between the parties, or, in the event that no agreement is reach by them, the appointment of a *curator* or a liquidator or a receiver to divide the joint estate. Absent an agreement, division of the joint estate cannot be accomplished by one of the parties. In *Revill v Revill*[3] the legal position is

[2] Act 70 of 1979.
[3] 1969 (1) SA 325 (C) 326 E-F

explained:

> "The true position is that no man can be a judge in his own cause. In other words, neither party can take upon himself or herself the right to divide the joint estate. In fact, no party in any form of community is entitled to divide the common property and the other party be forced to accept that position."

[14] The court referred with approval to the judgment of Innes CJ in *Gillingham v Gillingham*[4] where he stated:

> "The law governing this matter seems to me to be perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, Who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has the power to appoint some person to effect the division on its behalf. Under the general powers which thee court has to appoint curators it may nominate and empower some one (whetherhe is called liquidator, receiver, or curator-perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African court is clear."

[15] The principles in relation to dissolution of partnerships can generally be usefully applied where there is no agreement between the parties how the joint estate should be divided.[5]

[16] I am in agreement with the submission by counsel for the applicant that the pension benefit was deemed to be an asset in the estate in community. When the benefit was paid into the account of the second respondent it simply became an asset of the joint estate. The court order preserved half of that amount pending the finalization of the divorce action. Neither the order for the division of the joint estate nor the interim <u>order entitled the applicant</u> to the amount of R1 264 019.02, without a division of

---

[4] 1904 TS 609, 613.
[5] *Robson v Theron* 1978 (1) SA 841 **(A).**

the joint estate first being effected by consent or division by a receiver. Neither of the orders, relieved any of the parties from dividing the joint estate.

[17] It may very well be that the applicant is entitled to the amount claimed. It is common cause that no agreement exist as to the division of the joint estate. The whole purpose of this application is to achieve payment of a particular asset in the joint estate, without an agreement or the appointment of a receiver to divide of the entire joint estate, as at the date of divorce. It is reiterated once again: "no man [or woman] can be a judge in his [or her] own cause." The applicant has taken upon herself the right not to divide the joint estate, but to divide only the asset of joint estate preserved in the bank account of the second respondent.

[18] The second respondent is a necessary party in the proceedings by virtue of joint ownership of, and his interest in, the asset which the applicant seeks to obtain from the joint estate.[6]

[19] The applicant, in my judgment, has failed to make out a proper case against any of the respondents. In the result the application should fail with costs. The first respondent asked for costs on a punitive scale. I am not prepared to adhere to the request.

ORDER

The application is dismissed with costs.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

[6] It will be recalled that no relief is sought against the second respondent. Also *Morgan and Another v Salisbury Municipaltiy* 1935 AD 167, 171.

<u>APPEARANCES</u>

1.	For the Applicant:	D Thumbathi
2.	For the Respondent:	C Richard
3.	Date of hearing:	04 June 2020
4.	Judgment delivered:	11 June 2020