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**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

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|------------------------------|----|
| Reportable:                  | NO |
| Of Interest to other Judges: | NO |
| Circulate to Magistrates:    | NO |

Case No: 357/2018

In the matter between:-

**K M**

**PLAINTIFF**

**And**

**S M**

**DEFENDANT**

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**CORAM:** MOLITSOANE, J

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**HEARD ON:** 16 MAY 2019

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**JUDGMENT BY:** MOLITSOANE, J

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**DELIVERED:** 22 JULY 2019

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- [1] The Plaintiff instituted an action against the defendant for payment of an amount of One Million Rand together with interest at 10, 25% per annum *a tempore morae*. This claim arises out of a divorce order granted by the court on the 19<sup>th</sup> February 1998. Pursuant to the divorce order the parties entered into an agreement on the 9<sup>th</sup> February 1999 relating, inter alia, to the division of the pension interest of the defendant.
- [2] The defendant raised a special plea of prescription. The parties requested that I adjudicate on the special plea only and I acceded to the request and ordered separation of this issue from the merits in terms of Rule 33(4). Both parties testified and did not call any witnesses.
- [3] The following facts are common cause between the parties:
1. That a final order of divorce was granted by the Court on the 9<sup>th</sup> February 1998;
  2. That the Court ordered that Mr Van Biljon of the then firm, Kriek and Cloete be appointed as a liquidator to divide the joint estate of the parties;
  3. That on the 9<sup>th</sup> February 1999 the parties entered into a written agreement in terms of which they agreed that the

plaintiff would be entitled to 50% of the pension interest of the defendant as at the date of divorce;

4. That the defendant received his pension interest during or about September 2014.

[4] It is apposite at this stage to mention that it is the plaintiff's case that during or about the year 2016 the defendant undertook to pay 50% of his pension interest to the plaintiff. This allegation is denied by the defendant. In view of the finding I make later, it is unnecessary to traverse this dispute.

[5] It is the defendant's case that plaintiff's claim is based on a contract which was concluded on the 9<sup>th</sup> February 1999. Defendant alleges thus that the claim of the plaintiff fell due on the said date of the conclusion of the agreement. Defendant further pleads, in the alternative, that the plaintiff's claim fell due on the date the defendant's pension interest was paid out, *to wit*, the 1<sup>st</sup> September 2014. Seeing that the plaintiff only served her summons during or about 2018, more than three years after the pension interest was paid out, it is contended that the plaintiff's claim has prescribed.

[6] The defendant raised various reasons on which she asserts that her claim has not prescribed.

[7] In my view the question for determination is whether the claim of the Plaintiff has prescribed. It is not in dispute that an order of divorce was granted by the court including the division of the estate. The Parties then entered into an agreement specifying

in detail how the division should take place. In her particulars of claim the Plaintiff pleads as follows:

### **AD PARAGRAPH 8**

*“The agreement was concluded as a result of the Court Order and merely regulated how division of the joint estate should take place in terms of the Court Order.”*

To this end the defendant pleads as follows to paragraphs 1 to 8 of the plaintiff's Particulars of Claim:

### **AD PARAGRAPHS 1 TO 8**

*“The defendant admits the contents of these paragraphs (my emphasis). The defendant specifically pleads that the joint estate has already been divided between the parties.”*

- [9] It is clear in my view that the defendant does not dispute that the subsequent agreement regulated how division ought to take place. It is my considered view that if the parties agree that the subsequent written agreement entered into on the 9<sup>th</sup> February 1999 only regulated how division should take place, it follows that the plaintiff's claim is not based on the written agreement but on the judgment granted on the day of divorce.

- [10] Section 10 of the Prescription Act 68 of 1969(the Act) provides as follows: *“Subject to the provisions of this Chapter and of Chapter 1V, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of that such debt.”*

The agreement in this case regulated a judgment. The period of the running of prescription is in turn governed by s11 (a) of the Act which provides that the period of prescription of judgment debt shall be thirty years.

- [11] It is indeed so that the divorce order is silent on the issue of pension. That, however, does not detract from the fact that the Court had ordered the division of the estate and the parties in their quest to regulate the terms of the division agreed to share the pension interest equally. This agreement and/or the alleged undertaking of 2016 referred above do not, in my view novate the Court order granted when the parties divorced.

- [12] The written agreement was not made an order of court. I am of the view that, absent the judgment, the result would have been different as the claim could invariably have prescribed in three years. Unlike in this case where there is a judgment. In my view the cause of action seeking to enforce the division of the pension interest goes to the heart of the order of divorce itself and not on the subsequent written agreement intended to regulate the divorce order. I am satisfied that the plaintiff's claim is based on a judgment and a judgment prescribes in 30 years. Thirty years has not elapsed and it is unnecessary to traverse the issue of the alleged undertaking.

[13] I now turn to the issued of costs of this special plea and the reserved costs of the 5<sup>th</sup> March 2019. The award of costs lie in the discretion of the Court. I have listened to the testimony of both parties. Both struck me as people whose memory had faded with time .It would not be in the interest of justice that anyone of them be mulct with a cost order although one may say that the defendant was successful in resisting the special plea.

It is indeed so that I ordered the defendant when he sought a postponement on the basis that he was sick to bring a medical certificate. He did not bring same but his Counsel handed a copy of a document which purported to prove that the defendant was in hospital and sick, styled 'Patient referral letter'. This document is dated the 7<sup>th</sup> March 2019.From the document it is difficult to conclude whether he was sick or not. I will thus give the defendant the benefit of the doubt. As a result I am of the view that it would be fair that no order as to costs be made. I accordingly make the following order:

## **ORDER**

1. The Special plea is dismissed.
2. Each party to pay his or her costs.

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**P.E. MOLITSOANE, J**

On behalf of the Plaintiff:

Adv B.S Mene  
Instructed by:  
**Matlho Attorneys**

Bloemfontein

On behalf of the Defendant

Ms IL De Wet  
Instructed by:  
**Legal Aid South Africa**  
BLOEMFONTEIN