FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A231/2014

In the appeal between:-

M[…] B[…] M[…] Appellant

and

K[…] G[…] M[…] Respondent

HEARD ON: 09 March 2015

CORAM: JORDAAN, J et S.J REINDERS, AJ

JUDGMENT BY: JORDAAN, J

DELIVERED ON: 12 March 2015

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[1] The Appellant was the Defendant in divorce proceedings held in the Regional Court Free State Division in Welkom. Although the papers in that matter are not part of the record in this matter, it appears that the Appellant as Defendant filed a notice of intention to defend after which certain written settlement negotiations were entered into between the attorneys for the parties. Although it appears that the parties

were more or less ad idem regarding the settlement proposals, the attorneys never drafted a settlement agreement and none was ever signed. On the contrary, at a certain stage the Plaintiff (Respondent in this matter) through her attorneys filed a notice of bar on the Appellant's attorneys who withdrew with the end result that the divorce was heard and a decree of divorce and ancillary relief granted in the absence of the Appellant.

[2] It appears as if the Respondent (Plaintiff in the divorce proceedings) prayed for division of the joint estate of the parties with the exception of the house and car. In accordance with that prayer the court order granted in par d thereof reads as follows:

> "That the joint estate of the parties be divided with the exception of house and the car (sic)."

[3] Although the said order does not specify what is to happen with the house and car, it appears from the correspondence and evidence before this court that the intension was that Appellant forfeits his interest in those assets and it is awarded to the Respondent as Plaintiff. Nothing turns on this.

[4] The Applicant thereafter brought an application for rescission of par d of the aforesaid order without any specific prayer as to what the order should entail. It appears that the bone of contention mostly laid in the Appellant's claim to be entitled to 50% of the Respondent's pension interest as at the time of divorce. The application for rescission by the Appellant was opposed by the Respondent and at some stage the learned Regional Magistrate in collaboration with the parties ruled that certain questions should be decided and would be decisive of the application. Those questions, which are of relevance of present matter, are the following:

a. Whether there was a binding settlement agreement entered into between the parties before the date of divorce order being granted which should have been made an order of court.

b. Whether a pension interest of a party forms part of the joint estate of the parties.

c. Whether it is necessary that a claim in regard to such pension interest be specifically pleaded.

[5] After hearing argument the court a quo found in regard to the first question that no valid and binding settlement agreement came into being and as far as the second question is

concerned that a pension interest indeed forms part of the estate to be divided and as regard to both the second and third questions above the court found:

> “The only problem is how the court order is worded. If it is not in accordance with the Pension’s Fund Act 24/1956 read with the divorce Act, it cannot be enforced against the fund.
>
> The order must therefore clearly state the name of the pension fund, the number of the fund, the percentage or amount, the period in which another party is entitled to benefit and the order that endorsement is made as it is required by section 7(8).
>
> Where the order does not specify the above mentioned as required by the Pension Fund Act and Divorce Act, the party who is entitled to a share in another’s pension interest does not necessarily lose its claim. This party can approach the court for an amendment. (See Divorce and Pension interests by Lize De La Horpe; finweek November 20 2013). This in my view is the position in this application.
>
> As I earlier indicated both parties referred the court to **<u>Sempapalele v Sempapalele</u>** and also **<u>Maharaj V Maharaj</u>** which are the Free State and KZN decisions respectively. The cases both decided the issues of the pension interest, whether it forms part of the joint estate.

> In the case Of Sempapalele, Judge Musi said the pension interest must be dealt with expressly at the time of the divorce as it does not automatically fall into the joint estate and this view answers the third and last question raised by the Applicant which question the Applicant required the court to deal with.”

[6] The court a quo found that it is bound by the decision of this division in the aforesaid Sempapalele matter and that the third question should therefore be answered against the Appellant since there was no specific claim for a pension interest filed in the matter.

[7] As far as the issue as to the settlement negotiations is concerned, it is obvious that the correspondence between the parties in that regard consists of settlement negotiations bona fide entered into and in that regard without prejudice. It is also clear that both parties awaited a formal draft agreement to sign if satisfied therewith and that only then it would form a binding deed of settlement. That was also the stance taken by the Respondent in the application in the court a quo in the opposing affidavits to which no replying affidavit was ever filed.

[8] In the result I am not convinced that the court a quo erred in that respect and I am therefore in agreement with the court a quo that the Appellant was not entitled to an amendement of the decree of divorce so as to include the so called settlement negotiations in such order.

[9] As far as the second and third questions are concerned the two can be dealt with simultaneously. It should be noted that the questions posed, including the first one, were recorded as if the court a quo were to issue declaratory orders on those questions. Of course the court a quo did not have jurisdiction to issue declaratory orders. However, I accept that the real intention was to decide those issues so as to decide whether an order amending the decree of divorce order should be granted or not and were not really meant to serve as declaratory orders but only as reasons for the eventual finding as to the success or not of the application for amendment as agreed between the parties.

[10] The second and third questions necessitates an investigation into the correctness of the relevant findings of the court in the Sempepalale matter and also, as far as it concurs in those findings, the judgment in the matter of **DML v LJL**, a judgment

of another single judge of this division in case nr 3981/2010 delivered on the 25th of April 2013 and reported as **ML v JL Saflii 2013 ZAFHC 55.** These judgments were correctly held by the court a quo as binding on it, notwithstanding the dissenting judgments in other divisions by single judges of those other divisions.

[11] In **Sempapalele v Sempapalele and another 2001(2) SA 306 (O)** the particulars of claim contained a prayer for division of the joint estate and a separate claim for a proportionate share of the pension interest of the other party. The parties however entered into a deed of settlement. It was agreed that the joint estate should be divided, without any particular reference to pension interest. After the divorce proceedings were finalised, the Applicant in that matter applied to court for payment of a specific amount being 50% of the amount paid to the Respondent in that matter, after the divorce has been finalised, by the Respondent's pension fund.

[12] At page 309 I the court defined the relevant issue as follows:

"this raised the legal question of whether the Respondent's pension interest was at the time of dissolution of the marriage part of the joint estate so that it automatically fell within the terms of the blanket order for division or whether the Applicant needed to obtain a court order awarding her a share of such interest in terms of Section 7 of the Divorce Act 70/1979."

[13] In the judgment the court had regard to the report of the Law Commission in project 41 and came to the conclusion that there were two cardinal points, namely that, firstly a share of the pension interest of a member spouse is not to be awarded to the non-member spouse without more ado. The court found that it entails a consideration of various factors some of which may only be established by evidence and that sufficient facts must be put before the court to enable it to arrive at a proper decision and to make an appropriate award, which not necessarily meant half of the value of such interest. Secondly the court found that the report showed that, in the absence of an agreement between the parties, a court order must be obtained. The court then comes to the conclusion that section 7 of the Divorce Act supports those views.

[14] In its reasoning, the court in that matter found some significance in the fact that Sub section 7(1) of the Divorce Act "pairs" the issue of division of assets with the issue of the

payment of maintenance. The court then refers to the necessity of evidence as to the value of the pension interest for purposes of making the necessary decision and allocation. It also found that the “pairing” is of significance and that it indicates that the section requires the question as to division of assets to be dealt with in the same way as an award of maintenance, namely that it should be ordered and dealt with finally at the time a decree of divorce is granted and cannot be revived later.

[15] In my view the fact that the two issues are dealt with in the same sub section where provision is made for an agreement between the parties to be made an order of court, does not justify an inference that something special was intended. The following sub paragraphs 2 – 5 deals with the question of maintenance separately from the division of assets. Secondly the fact that entitlement to maintenance terminates at the dissolution of a marriage unless the court orders, or the parties agree to, the payment of maintenance thereafter, stems from the common law and the nature of the right to maintenance. Proprietary rights of parties do not lapse at the termination of the marriage. The mere fact that both can be agreed upon in terms of sub section 1 does not justify an inference that both

are to be dealt with in the same manner when the marriage is terminated by divorce. Of course, where there is a dispute about the proprietary rights of the parties relating to either the division or forfeiture of rights and the value thereof, the necessary evidence has to be adduced. Where however the parties are ad idem that a joint estate should be divided, which is in any event the automatic consequence where an order of divorce in regard to marriage in community of property is granted and nothing else is asked for, such evidence is not necessary at the stage of granting of the decree of divorce. If, after such dissolution of a marriage, the parties dispute the division, a court can be approached to either deal with the matter itself or appoint a liquidator.

[16] It regularly happens that a plaintiff sues for divorce and prays for division of a joint estate and the matter is then not defended. In such a matter there is no need for any reference to pension funds or any evidence in regard thereto. The legal effect is clear namely that each of the parties is entitled to half of the joint estate. Sub section 7(a) is clear and unambiguous in stating that in the determination of the benefits, the pension interest of the parties shall be deemed to be part of the assets.

In the factual division of the joint estate the parties may agree to any form of division. Both parties may be entitled to a pension interest in his own name and agree to each keeping his own interest. They may agree that the one party receives a certain asset in exchange of a pension interest of the other party etc. It is only when a dispute arrives as to the division that it is necessary to either appoint a liquidator or approach the court. Such dispute can refer to the value of a pension fund interest at the date of divorce or to any other asset and the value of any other asset in the joint estate.

[17] The matter of **ML v JL (*supra*)** was an opposed divorce matter where, inter alia, forfeiture of certain benefits were prayed for. The remarks made by the judge in that matter should be viewed against that background which necessitated the necessary evidence to decide upon the forfeiture issue. Unfortunately some of the findings of the court in that matter create the impression that it is of general application in all matters. Unfortunately the judgment is not an example of clarity and there are quite a few aspects that I, with respect find difficult to concur with. Those aspects however do not all apply to the issues in this matter and is better left alone at this stage.

[18] In paragraph 57 of that judgment it appears that the court concurs with the findings in the Sempapalele judgment. In particular the court found that a pension interest does not automatically fall within the ambit of a customary division of the joint estate and it can only be part of a division if a specific order is made by a court in that regard. The court found that it has to be pertinently pleaded and claimed. I am unfortunately not able to agree.

[19] In the matter of **Maharaj v Maharaj and others 2002 [2] SA 648 [DCLD]** at page 650 J – 651 E the issue is dealt with, to my mind, correctly. At page 650 J and with reference to the Sempapalele judgment, the learned judge remarked as follows:

> "But, if the learned judge intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half share thereof, I am, with respect, unable to agree with that view."

[20] In the same vain, the judgment in **<u>Fritz v Fundsatwork Umbrella Pension Fund and others 2013 [4] SA 492 [ECP]</u>** from page 495 par 15 to 497 par 24, in my view correctly sets out the law. After discussing the Sempapalele and Maharaj judgments the learned judge at page 496 par 21 remarks as follows:

> "The effect of this passage is that an order may be sort in terms of ss(7) even if a divorce order has already been granted. There is however a very important qualification, as is apparent from the quoted passage itself. In the Maharaj matter the evidence indicated, although there had been an order of divorce, division of the joint estate had, as a matter of fact, not yet occurred. In other words, the determination of constituted the joint estate and its proper division between the parties, as required by the decree of divorce, still had to be undertaken, whether by agreement between the parties or by way of the appointment of a liquidator."

In par 22 on the same page of the same judgment the learned judge remarks as follows:

> "In the event that a court orders division of a joint estate and the parties are not, after such order is made, able to reach agreement regarding the division of the estate, the dispute may be resolved by the court itself or by the appointment of a receiver or liquidator

> who gives effect to the division of the estate on behalf of the court."

The learned judge in this matter then in par 23 concludes as follows:

> "This, in my view brings the process of giving effect to an order of division of the joint estate, by way of a subsequent appointment of a receiver or by way of the resolution of a dispute in the relation to the division by the court, squarely within the ambit of Section 7(7) of the Divorce Act, which speaks of determining the patrimonial benefits in a divorce action."

[21] The result of the aforementioned is that, when parties by deed of settlement agrees to a blanket division of a joint estate or when an order of court orders division of a joint estate, the pension interest of such parties who have such interest automatically fall to be divided as part of the joint estate. Such an agreement or order defines the rights of the parties in regard to the proprietary rights in and to the joint estate. One must differentiate between orders that define the rights of the parties and orders aimed at giving effect to such rights. Orders granting division of a joint estate and orders granting forfeiture to some or other extent are all orders defining the rights of the

parties. Thereafter, if the parties cannot agree as to giving effect to such orders defining their rights, the court can be approached to grant orders either appointing liquidators or deciding the issue as to the actual division of the estate. Those latter types of orders do not have to be issued at the time of granting the decree of divorce. (Only orders defining such rights.) The orders that a court is authorised (and not obliged) to make in Sub section 7(8) of the Divorce Act are orders that are aimed to give effect to the defined rights of the parties.

[22] The prescripts of the pension funds Act 24/1956 might necessitate at least the identity of the relevant pension fund to be contained in a court order. Section 37(D)(4)(a) stipulates that a non-member who has been awarded or are entitled to a part of a pension interest may submit the court order to a pension fund who is named in the order or is identifiable from the decree of divorce. Such fund then has to deduct the relevant portion from the pension interest of the member spouse and (contrary to what Section 7(8) of the Divorce Act foresees) may be paid out to the non-member spouse according to his or her choice. (See Section 37(D)(4)(b).)

Where a settlement agreement provide for a blanket division of a joint estate or a court order orders a blanket division of a joint estate, all pension funds to which any of the spouses belong and had an interest in at the date of divorce are involved, in the sense that all such pension interests are deemed to be part of the joint estate. It then appears to be clear that all the pension funds involved as aforesaid are identifiable from the decree of divorce since the only question is whether the spouses were members of and had a pension interest at the date of divorce. Strictly speaking it would then not even be necessary to enter a specific name of a pension fund in a court order.

[23] Although I am convinced that the decisions of the single judges in this division referred to above and which the trial court concluded prevented it from granting relief, are wrong, the question still remains whether relief could and should have been granted in any event.

[24] As stated above, with reference to the applicability of the order of division to any pension fund of which the Respondent was a member at the time, it was open to the Appellant to submit such order to the relevant pension fund in terms of Section

37D(4)(a) of the Pension Fund Act as aforesaid. There is no allegation that he did that or even considered doing that. If he did that and the pension fund refused to adhere to the order of division and allocate a 50% interest calculated as at the date of divorce in his favour, he then could have approach the court for an order compelling them to do that. Alternatively and if they required the name the fund to be specifically mentioned in the order he should have approached the court for an amendment to the effect that the specific pension fund be named in the order in accordance with Section 7(8) of the Divorce Act. That would rather entail an amplification of the order and not really an amendment. For that purpose at least the name of the relevant pension fund should have been mentioned or sufficient particulars as to be able to identify such fund in the order. That has not been done.

[25] Another obstacle in the way of the Appellant is to be found in the judgment of Goosen J in the matter of **Fritz v Fundsatwork Umbrella Pension Fund and others (*supra*)** at page 497 para 27 to the effect that, where division of the estate has been finalised, an application such as the above is not competent any more. The question whether the division has been finalised or not in the present matter has not been

explicitly raised by any of the parties in the affidavits. It was the duty of the Appellant as Applicant to convince the court that it was still possible to grant the necessary orders, in other words to show that the division of the joint estate has not been finalised as yet. That he failed to do.

[26] In conclusion, the fact that I am convinced that the decisions of the single judges in this division on which the court a quo relied and regarded as prohibiting the granting of the application, are wrong and should not be followed, does not necessarily mean that the Appellant should have succeeded in the court a quo.

His application was firstly premature and brought before he even tried to give effect to the order by submitting that to the relevant pension fund, and secondly lacked the necessary allegations and information to enable the court to grant an order in terms of Section 7(8) of the Divorce Act. He also failed to show that the court would still be entitled to grant an order by failing to allege and show that the division of the estate has not been finalised as yet. For those reasons the application should have failed in any event although for different reasons than those relied on by the court a quo.

[27] In the result the appeal is dismissed with costs.

A.F. JORDAAN, J

I Concur

S. J REINDERS, AJ

On behalf of the appellant:	Adv. I.J Bezuidenhout Instructed by: UFS Law Clinic BLOEMFONTEIN c/o Maree Gouws Attorneys WELKOM
On behalf of the respondent:	No appearance

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