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

Case No. : 3981/2010

In the matter between:-

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| **D M L** | Plaintiff |
| and | |
| **L J L** | Defendant |

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| **HEARD ON:** | 19 MARCH 2013 |
| **JUDGMENT BY:** | RAMPAI, J |
| **DELIVERED ON:** | 25 APRIL 2013 |

[1] These are divorce proceedings. The parties have lived together as husband and wife. They are now on the verge of parting ways. Both of them agreed, albeit on different grounds, that their marriage relationship has irretrievably broken down. The core of their disagreement concerns the defendant's claim to the plaintiff's pension interest.

[2] The parties were married to each other in community of property and without an ante-nuptial contract in Bloemfontein on 19 August 2005. The marriage still subsists. There are no minor children born of the marriage. There is no written agreement devolving the patrimonial benefits.

[3] Before the marriage the defendant was a radio announcer in the employ of the South African Broadcasting Corporation. He was seemingly also a member of a pension fund then. He resigned from the SABC. Upon his resignation he claimed his pension benefits. The pension fund seemingly paid out to him approximately R350 000,00 when the pension benefits of his pension interest accrued.

[4] At the time of the hearing, the defendant belonged to no pension or provident fund. However, he is still gainfully occupied. Currently he earns his livelihood as a businessman. He runs a pub, in other words a tavern. On average his weekly profit fluctuates between R3 000,00 and R5 000,00.

[5] The defendant sought, apart from the final decree of divorce, and the forfeiture of patrimonial benefits arising from the marriage in community of property, a special order declaring him to be entitled to 50% share of what was referred to as the plaintiff's "pension proceeds".

[6] The defendant's counterclaim was founded upon the allegations:

- that the plaintiff habitually burdened the joint estate, without consulting the defendant, with financial obligations which she cannot afford to settle;
- that she contributed virtually nothing towards the upkeep and material growth of the joint estate;
- that undue pressure was often exerted upon the defendant to settle such debts alone and

- that the plaintiff took most of the joint assets away from the communal home when she deserted the defendant *cum animo non revertendi* during September 2009.

[7] The plaintiff denied the defendant's allegations. The foundation of her replication, in other words, the plaintiff's plea, was based on the allegations:

- that the defendant was also a member of a pension fund;
- that when he left the employment of the SABC he, through resignation, became entitled to payment of his pension benefit;
- that he subsequently used such money exclusively for his personal benefit and
- that he would, therefore, unduly benefit if he were to receive a share in the plaintiff's pension benefit.

[8] Perhaps I have to add that in her declaration attached to her summons the plaintiff had prayed for the general division of the joint estate.

[9] Those then were the rules of engagement. The defendant's grounds of the claim have to be considered against the backdrop of the plaintiff's grounds of resistance.

[10] The crisp issue in these action proceedings was whether or not, on the peculiar factual circumstances of this particular action, the defendant was entitled to an order whereby he was declared to be entitled to a 50% share of the plaintiff's pension interest, calculated as at the date of the divorce, when it

eventually ripens into pension benefits on some date in the future.

[11] The phrase "pension interest" is defined in section 1 Divorce Act 70 of 1979 as amended:

> "**'pension interest'**, in relation to a party to a divorce action who-
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> *(a)* is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;"

*(b)* The subsection is not relevant.

[12] In the case of **<u>Elesang v PPC Lime Ltd and Others</u>** 2007 (6) SA 328 (NC) Olivier J observed that when regard was had to the definition of the phrase "pension interest" it appeared that it applied only in the case where one of the spouses was still a member of a pension fund at the time of the divorce.

[13] Section 7(7)(a) Divorce Act 70 of 1979 as amended 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."

[14] In the case of **Sempapalele v Sempapalele and Another** 2001 (2) SA 306 (O) Musi J, as he then was, commented as follows about subsection 7(a):

> "Now s 7 of the Divorce Act was introduced precisely to improve on the existing law. The section does not, however, abolish the existing law but rather opens a window and provides a mechanism, for parties engaged in divorce proceedings, to have access to the pension interest of either of them for purpose of achieving an equitable distribution of their assets. It provides that the pension interest of a party shall be deemed to be an asset in his estate for that purpose. This means that the interest is not ordinarily part of the joint estate but shall be such for purpose of division upon divorce."

[15] In pretty much the same vein in **Maharaj v Maharaj and Others** 2002 (2) SA 648 (D) at 651B Magid J approvingly stated that it was quite clear, as held by Musi J, that prior to the introduction of section 7 into the divorce statute, one's pensions interest did not form part of the joint estate of spouses married in community of property.

[16] In the case of **Kotze v Kotze and Another** 2013 JOL 30037 (WCC) at [19] Saldanha J, writing for the full bench, held:

> "It appeared that prior to the introduction of section 7 of the Divorce Act, the party whose spouse was a member of a pension fund did not have a recognised interest in the pension of such other spouse. Where such benefit had not yet accrued it was not generally regarded as an asset in such pension holder's estate where the marriage was in community of property and moreover

> neither wat it regarded as an asset of the joint estate. In determining the patrimonial benefits in the joint estate the pension expectation was not taken into account. With the introduction of section 7(7)(a) in the Act the situation changed substantially."

[17] An individual's pension interest was never an asset in the joint estate of spouses married in community of property prior to the enactment of the aforesaid section 7. Notwithstanding comments or views to the contrary, even after the enactment of section 7, an individual's pension interest is still not an asset in a joint estate of spouses married in community of property. It is only an expectation of pension benefit yielded by a ripe pension interest which becomes an asset with real economic value – **KOTZE**'s case, *supra*. But even then it becomes an asset in the separate estate, post decree of divorce, of a spouse who was a member of a pension fund. The section deems it to be so.

[18] When a pension interest ripens, the administrator of the pension fund concerned determines the actual monetary value of a pension interest. Such value constitutes a pension benefit, which accrues from a ripe pension interest in favour or a member spouse.

[19] A pension benefit is accrually derivative from a pension interest. The defendant's entitlement, if any there is, to the plaintiff's future pension benefit has to stem from the provisions of subsection (7)(a) read together with those of subsection (8)(a).

The former 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."

[20] The latter provides:

> "(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-
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> *(a)* the court granting a decree of divorce in respect of a member of such a fund, may make an order that-
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> (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;
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> (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;"

[21] In the case of **Eskom Pension and Provident Fund v Krugel and Another** [2011] 4 ALL SA 1 (SCA) at par [11] Maya JA had this to say about the two concepts "pension interest" and "pension benefit":

> "'Pension interest" is narrowly defined in the Divorce Act and it refers to the value of the interest which a member of a pension fund, on the date of his divorce, has in the pension benefit that will accrue to him as a member of such fund at a certain future date. It is readily apparent from all these statutory provisions that what is contemplated is an award to the non-member spouse of any part of this interest (and no other amount held by the fund in respect of the member spouse) calculated as at the date of the divorce but with effect from a certain date in the future when the pension benefit accrues to the member spouse. Once the pension benefit has accrued i.e. beyond the date of divorce at which time the pension interest converts into a pension benefit, the provisions of sections 7(7) and 7(8) are no longer applicable.'"

[22] In deciding whether a spouse of a marriage in community of property is entitled or not to claim a share in the other spouse's pension interest, three scenarios have to be borne in mind. The first scenario arises in a case where a pension benefit accrues from a pension interest post-divorce, but a claim thereto is made prior to its accrual.

[23] Here the scenario has a hybrid character. Firstly, a portion of a pension benefit expected to accrue to a pre-divorce segment of a pension interest becomes claimable by a non-member. However, such a share becomes due and payable on a future date when a pension benefit accrues – subsection (7)(a). The discretion entrusted to a divorce court in terms of subsection (8)(a) is strictly confined to such portion of a pension interest and its corresponding pension benefit. I am of the same view

as Magid J that subsection (7)(a) was presumably inserted in the divorce legislation in order to ameliorate the inequitable hardship of what may have been regarded as an injustice to a spouse who did not have a pension interest in any pension fund – *vide* **Maharaj**'s case, *supra*, at 651C.

[24] Before the divorce the pension interest of the member is like a nest feathered by the financial contributions which otherwise would have contributed towards the growth of the patrimonial benefits of the joint estate. It would seem to me that this was the equitable consideration which underlined the rationale behind the introduction of subsection (7)(a). In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, it is such a segment of a pension interest of a member's spouse which is deemed to be part of such spouse's asset in a separate estate – subsection 7a). This is so because subsection (7)(a) and subsection (8)(a) apply exclusively to a pension benefit derived from a pension interest, if and only if, such pension interest would have accrued on the date of the couple's divorce.

[25] Secondly subsection (7)(a) does not apply to any pension benefits which accrue from a pension interest subsequent to the divorce. This then is the other fasette of a hybrid character of a pension interest whose existence spans over period divided by divorce into two intervals. A non-member spouse has no legitimate claim to a portion of a member's pension benefit

accumulated or generated or derived from such a member spouse's pension interest beyond the date of the couple's divorce – **Eskom Pension and Provident Fund v Krugel and Another**-case, *supra*, at par [11]; **Government Employees Pension Fund v Naidoo and Another** 2006 (6) SA 304 (SCA) par [18].

[26] The second scenario is encountered in a case where a pension benefit accrues from a pension interest long before a couple's divorce. In the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, there can be no more pension interest whatsoever in respect of which a previous non-member spouse can claim entitlement. It would, therefore, be obviously absurd to talk about a pension benefit where no pension interest no longer exists – **Krugel**'s case, *supra*, at par [12]. It logically follows that the former non-member spouse has no ligitimate entitlement by virtue of subsection (7)(a) and subsection (8)(a) statutory remedies. The two subsections were not intended to apply to pension benefits that accrued during the subsistence of the marriage long before their divorce. That is not the situation here – hence my comments are *obita dicta*.

[27] The third scenario is encountered where a pension benefit accrues from a pension benefit neither before nor after a couple's divorce, but on the very date of their divorce. In such a scenario the whole of such pension benefit becomes subject to

the provisions of subsection (7)(a) and subsection (8)(a). In such a scenario a member spouse would still be a member of a pension fund at the time a couple's divorce is finally decreed. A pension fund would still be identifiable, a pension benefit would be quantifiable and an appropriate share for a non-member would be ascertainable. Again my views are *obita dicta* because that was not the real situation I had to grapple with.

[28] The instant matter falls under the first scenario. It seems to me that it has all the hallmarks of the first hybrid. It was a real factual matrix which I had to grapple with. In his counterclaim the defendant prayed for an order declaring that he was entitled to 50% of what was referred to as the plaintiff's "pension proceeds". No such a phrase or concept is defined in section 1 or can be found in section 7 or anywhere else in the applicable statute as a whole. Nonetheless I am aware and mindful of his good intentions. I took it that by "pension proceeds" the defendant intended to mean "pension interest".

[29] By means of the deeming provisions of subsection (7)(a) read together with subsection (8)(a), the defendant, as a non-member spouse, would theoretically be able to secure a pre-divorce segment of the plaintiff's pension interest by virtue of those statutory provisions. Section 7(8)(a) defers the actual payment of part of a pension interest to a non-member spouse to a time when any pension benefits accrue in respect of that member. The provisions envisage that pending an accrual of

pension benefits in the future, meaning sometime after the date of divorce, a non-member shall have a prospective entitlement, however it would not be instantly enforceable entitlement to have actual payment accelerated on the strength of the final decree of divorce. In this matter pension benefit is still expected to accrue to the plaintiff from her pension interest. It cannot be fastforwarded prior to its expected accrual date through retirement in the ordinary course of events.

[30] The practical difficulty I encountered in this instant matter concerned lack of adequate particulars about the pension interest. The pension fund or provident fund was never identified – not in the pleadings, not in the pre-hearing minutes and not at any stage during the course of the actual hearing. Hardly any averment was made in the pleadings as regards the plaintiff's occupation, employer, pension fund, membership number, its administrators or its underwriters.

[31] In an appropriate case a court granting a decree of divorce may be inclined to exercise it discretion in favour of a non-member spouse, such as the defendant, in terms of section 7(8)(a). However, such a discretion cannot be exercised in a state of nothingness. In order to properly decide whether the defendant is entitled to have a proportionate share in the pension interest of the plaintiff, sufficient and accurate details of the pension fund have to be placed before the court.

[32] It is clear and obvious that unless such details are known and disclosed a court decreeing divorce would be unable to make an order:

- that any part of the pension interest **shall be paid by that fund** to the non-member spouse when the pension benefits accrue – *vide* subsection (8)(a)(i);
- that the registrar of the court in question **shall forthwith notify the fund concerned** that an endorsement be made **in the records of that fund** to the effect that a specific part of the pension interest concerned as percentaged, calculated and valued as on the date of the divorce has been awarded to the non-member spouse;
- that such award shall be payable to the non-member spouse whilst the pension benefits accrues in the future;
- that **the administrator of that pension fund** shall furnish written proof of such endorsement to the court registrar within one month of receipt of such notification – *vide* subsection (8)(a)(ii).

[33] It is logically apparent from the aforegoing requisite elements of an appropriate structure of a court order that the subsection envisages that a particular fund has to be specifically identified. That was not done in this matter. The *onus* of doing so rested on the claimant of the entitlement to the fruits of the pension interest – viz pension benefits. He failed to

discharge the onus. In **Sempapalele's** case *supra*, at 312B-C Musi J found:

> "Only the relevant pension fund would be in a position to furnish the value of the pension benefit at the relevant time and therefore **it stands to reason that such pension fund must be identified as well**."

[34] Dr Oelofse urged me to make an order in terms of subsection (8) in favour of the defendant in spite of the shortcomings of his pleadings and evidence. Her argument was based on the compassionate grounds that in the future the defendant would never afford to bring an application to court to claim his share of the plaintiff's pension benefit. I have sympathy with the defendant's predicament. The high costs of litigation in the high court are prohibitive and deplorable. However, that consideration cannot override the deficiencies of the defendant's case. I find myself handicapped by the lamentable paucity of constructive information needed to craft an appropriate order in terms of section 7(8).

[35] In the case **Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer** 2004 (5) SA 373 (SCA) at par [26], Van Heerden AJA, as she then was, said this about the imperative function of the high courts to carefully formulate divorce orders:

> "This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall

> within the ambit of ss 7(7) and 7(8) of the Act. If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings."

[36] It is prudent for an attorney acting for a non-member spouse to establish, at least, the identity of the pension fund without delay. As soon as a notice of set-down has been delivered, the administrator of the fund concerned must be approached with the request to advise as to what the value of the pension interest would be if its pension benefits were to accrue on the last date of the hearing – being a date on which the court would be expected to grant a decree of divorce. The dealings between the non-member spouse and the member's pension fund are purely administrative and not necessarily judicial communicative processes. For instance, the value of a pension interest can be verified by a letter provided such member has no objection. Otherwise the non-members would have to proof the authenticity as well as the truth of the contents of the letter in accordance with the rules of evidence.

[37] A pension interest as regards a member of a pension fund who is involved in a divorce action means the benefits to which that member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office – section 1(1). See **Elesang's** case *supra*, at par [9].

[38] At the moment the parties are on the verge of the divorce. In determining the patrimonial benefits to which they may be entitled, it has to be borne in mind that, at present, there is really no actual asset in the patrimonial basket called pension interest or pension benefit which they can immediately share according to the common law rules of divorce. See **Swemmer's** case, *supra*, at par [19].

[39] The pension interest of the plaintiff will mature sometime after her divorce. Upon her retirement or earlier resignation, whichever event shall occur first, she will be entitled to harvest the fruits thereof, termed pension benefits. The pension benefits can only accrue to the plaintiff from her pension interest either through retirement or resignation.

[40] Before the accrual date of her pension benefits her pension interest will not be deemed to be an asset in her separate estate created by her divorce. The words "in his separate estate" as used in the section requires that such a distinction be made between the fruits of the pension interest which form part of the patrimonial benefits at the time of the divorce and thus claimable and those which do not and thus unclaimable when the spouses divorce. It would be absurd to talk of a phrase "separate estate" of a spouse during the subsistence of a marriage in community of property.

[41] The defendant would not be entitled to a 50% interest in the plaintiff's entire pension interest as he prayed for in his counterclaim. His personal patrimonial interest in her pension

interest is limited to that interval of the pension interest which coincided with the subsistence of the marriage – section 7(7). To that particular portion of the pension interest both spouses would be entitled to share the pension benefits of the pension interest as generated between the date of commencement of her membership of the pension fund or the date of their marriage (whichever event occurred last) and the date of their divorce. The defendant would not be entitled to any share of the pension benefits to be generated after the date of the divorce. This is so because the post-divorce pension interest would be sustained by the plaintiff's exclusive resources of her separate estate.

[42] It can, therefore, be seen that a pension benefit constitute a rather unique patrimonial benefit of a marriage in community of property. Since 1989 it is deemed to be an asset but it is not immediately deliverable upon divorce as is the case with ordinay assets. It is specially protected by means of a special statutory endorsement – subsection 8(a)(ii). Such a special relief for such a unique asset requires special averments in the pleading of a non-member spouse. A spouse claiming an unusual relief must plead the necessary facts to support that unusual claim and formulate a proper prayer to define the nature of the unusual relief sought – **Khoza v Khoza** 1982 (3) SA 462 (T), cited by analogy only. In that case a spouse in a marriage out of community unusually prayed for forfeiture of patrimonial benefits without pleading the necessary facts to sustain such extraordinary relief.

[43] While it is not necessary to cite the pension fund concerned as a co-defendant – **Swemmer**'s case, *supra*, a spouse claiming an entitlement to the pension interest of another spouse has to plead the necessary facts on which such special relief is founded or can be said to be founded. In my view such a spouse would do well to aver facts relating to the other spouse's employer; the other spouse occupation; the name of the pension fund; the administrator thereof; the underwriter thereof; the other pouse membership number; the agreed retirement date of the other spouse, being the date on which the pension benefits would in the normal course of events, accrue to the member spouse – **Swemmer's** case, *supra*, at par [4]. Since none of those necessary facts are known to me, I am unable to entertain the defendant's special prayer for a share in the plaintiff's pension interest. In the light of the conclusion I have reached it becomes unnecessary to consider the defence raised by the plaintiff against the defendant's claim.

[44] As regards the rest of the patrimonial benefits the defendant prayed for forfeiture. This particular prayer also emerged from the blue. No foundation for it was laid in his pleadings. There were no crucial factors averred on which he relied for such a relief. The prayer for the forfeiture of benefits is governed by section 9(1) of the Divorce Act 70 of 1979 which provides:

> "(1) When a decree of divorce is granted on the ground of the irretrievable break-down of 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 an 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."

[45] About that section the author, R H Hahlo: **The South African Law of Husband and Wife**, Fifth Edition, on p 373 comments:

> "All this has changed. There are no longer 'innocent' or 'guilty' spouses in the old sense. 'Substantial misconduct' on the part of one or other of the spouses is only one of the factors which the court may take into consideration. And while it is presumably still the law that the courts may not make a forfeiture order unless one of the spouses applies for it, it is within the discretion of the court whether to make an order or to withhold it. It may make it in favour of the plaintiff or the defendant – there is nothing to preclude it from making an order in favour of the spouse who formerly would have been considered the guilty one."

[46] The parties were married to each other about eight years ago. However, they did not live together as husband and wife for that entire period. They cohabited for about four and a half years only. They have been living apart for the past three and a half years. Cohabitation ceased during September 2009. Therefore, they have effectively lived together as husband and wife for less than 5 years. The summons was issued about three years ago on 6 August 2010. In my view the duration of

their marriage was very short bearing in mind that a marital relationship normally endures for life.

[47] It was common cause that the plaintiff has a child born out of wedlock. Her undisputed evidence was that she conceived the child after the marital separation *a mensa et toro* during September 2009. The fact remains, though, that the child was conceived and born during the subsistence of the bond of marriage. To that extent, the plaintiff was guilty of adultery, a serious matrimonial misconduct.

[48] The plaintiff alleged that cohabitation ceased on account of the defendant's misconduct. Her evidence was that she caught the defendant and the couple's housekeeper having sexual intercourse at the couple's place of residence. She averred that she found the defendant's misconduct so irreconcilable with the normal marriage relationship that she decided to leave the defendant with the intention of never returning to him.

[49] Although the defendant denied the allegation, I believed the version of the plaintiff. She impressed me as a candid witness whose evidence was credible and reliable. Accordingly I find that the defendant was also guilty of adultery, a matrimonial transgression generally regarded as a very serious misconduct.

[50] Some balancing act is therefore required here. Both parties did not come to court with clean hands. Both were guilty of the

same matrimonial transgression. He misbehaved first and wrecked the marriage. She misbehaved later and destroyed any reasonable prospect of reconciliation, however remote it might have been. Having said that, I hasten to add that, in my view, the circumstances which really gave rise to the irreversible breakdown of the couple's marriage were chiefly precipitated by the defendant's conduct. The moral blameworthiness of his misdeed comparatively constituted more substantial misconduct than the plaintiff's. But guilt *per se* is no longer an overriding or decisive factor when a prayer for forfeiture is considered – Hahlo, *supra*.

[51] In the peculiar circumstances of this particular divorce action I have come to the conclusion that if an order of forfeiture is made, the plaintiff will, in relation to the defendant, be unduly prejudiced and thus matrimonially disadvantaged. On the facts it is my considered view that the defendant has not made out a case to justify his prayer that the plaintiff should forfit the patrimonial benefits arising out of the marriage. I would, therefore, exercise my discretion to withhold making such an order.

[52] The plaintiff prayed for the division of the joint estate in her declaration. However, in her testimony she urged me to award all the patrimonial benefits of their marriage in community of property, save for her pension benefits, to the defendant. Surprisingly her request was contested by the defendant. Failing forfeiture order, the defendant's legal representative

urged me to grant a division order for the general division without any specific qualification or exclusion.

[53] The division of assets between married but divorcing couples is governed by section 7 Divorce Act 70 of 1979 as regards the regime of this couples marriage. The section provides:

> “(1) A court granting a decree of divorce may in accordance with **a written agreement** between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other.
>
> (2) In the absence of an order made in terms of subsection (1) with regard to the payment of maintenance by the one party to the other, the court may, having regard to the existing or prospective means of each of the parties, their respective earning capacities, financial needs and obligations, the age of each of the parties, the duration of the marriage, the standard of living of the parties prior to the divorce, their conduct in so far as it may be relevant to the break-down of the marriage, an order in terms of subsection (3) and any other factor which in the opinion of the court should be taken into account, make an order which the court finds just in respect of the payment of maintenance by the one party to the other for any period until the death or remarriage of the party in whose favour the order is given, whichever event may first occur.”

[54] Where there is a written agreement, in other words, a deed of settlement, a court can make an order for the division of the joint estate in a particular manner as agreed upon by the spouses themselves – vide subsection1.

[55] Where there is no written agreement whereby specific assets of the joint estate are exclusively awarded to a particular spouse, a court is not empowered *mero motu* to make an order in terms of which specific joint assets are allocated to particular spouses against their will – *vide* subsection 2. This is implicit when the two subsections are conjunctively read.

[56] There was no written agreement in this particular matter as envisaged in subsection (1). Since subsection (1) does not apply the matter at hand would seem to be governed by subsection (2). That subsection is silent as regards the division of the couple's assets. It follows, therefore, that I cannot accede to the plaintiff's testimonial request. To do so would offend subsection (1) read with subsection (2).

[57] I have already dealt with the legal position concerning a spouse's claim to pension benefits. I have pointed out that a pension benefit which accrues from a pension interest is a unique patrimonial benefit which needs to be pertinently pleaded and claimed. It does not automatically fall within the ambit of a customary division of the joint estate. I am prompted to make these remarks because I gained the impression that the plaintiff laboured under the misconception that a general order of division of patrimonial benefits would entitle the defendant to a share of her pension interest. That is not the case. I hasten to add that if the defendant also thought likewise, as I think he did, he too was mistaken.

[58] Finally I am satisfied that the marriage relationship between the parties has irretrievably disintegrated and that there exists no reasonable prospects of restoring it to a normal marriage relationship. Therefore, I am inclined to decree an order of divorce. I do so primarily on the version of the plaintiff. The defendant's plea, counterclaim and testimony stand dismissed to the extent of their inconsistency with the plaintiff's declaration, plaintiff's plea and her testimony.

[59] On the facts, I am of the view that making an order of costs against the defendant would be a travesty of justice. He was born on 18 August 1958; she on 20 August 1982. He is 24 years older than she is. He suffers from a treadful disease according to his undisputed evidence. He projected the image of a frail and fragile man. He is clearly in a poor state of health. He desparately needs money for regular medical treatment. I am, therefore, inclined to exercise my discretion by making no order as to the costs of this action.

[60] In the result I make the following order:

60.1 The decree of divorce is granted.

60.2 The joint estate shall be divided.

60.3 There shall be no order of costs.

**M. H. RAMPAI, J**

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| On behalf of the plaintiff: | Attorney M. Khang<br>Instructed by:<br>Mphafi Khang Attormeys<br>BLOEMFONTEIN |
| On behalf of the defendant: | Dr J.M. Oelofse<br>Instructed by:<br>Oelofse & Kriel Attorneys<br>BLOEMFONTEIN |

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