

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A151/2023

(1) REPORTABLE: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

(3) REVISED: **YES**

DATE: 29 August 2024

SIGNATURE

In the matter between:

M[...] A[...] P[...]

APPLICANT

and

F[...] M[...] A[...] N[...]

RESPONDENT

SUMMARY

Appeal against an order dismissing an application for variation of a decree of divorce in which division of the joint estate was ordered.

The respondent failed to oppose the action and an order in terms of which a decree of divorce and division of the joint estate was granted, was granted in her absence. A subsequent application to appoint a liquidator similarly was granted in her absence after she failed to oppose that application.

The main asset in the joint estate was the respondent's pension fund. The order for division of the joint estate did not set out the details of the respondent's pension fund and accordingly the appellant was unable to execute the order.

An application for variation of the divorce order to include details of the respondent's pension fund was opposed by the respondent. The opposition was premised on an argument that the appellant should forfeit the benefits of the parties' marriage as he had substantially misconducted himself during its duration and had also failed to contribute or maintain the respondent or the joint estate.

The court a quo found that the appellant had indeed substantially misconducted himself as alleged, and subsequently dismissed the application for variation.

Held: An argument in respect of forfeiture must be adduced at the time that the decree of divorce is granted and an argument to this effect cannot be adduced ex post facto.

Held: A parties' pension interest automatically falls in the joint estate to be divided upon divorce in terms of s7(7)(a) of the Divorce Act 70 of 1979 and the entitlement of the non-member spouse to a share in the member spouse's pension interest is not depended on s7(8), with the result that if there is no reference in the divorce order to the pension interest, then each party is nevertheless entitled to an amount equal to 50% of the other's nett pension interest.

Held: Section 7(8) simply provides a mechanism in terms of which the pension fund of the member spouse is statutorily bound to effect payment to the no-member spouse.

Held: the application for variation was simply one which sought to give proper effect to the divorce order to avoid it becoming a brutum fulmen.

Held: the court a quo was thus not at liberty to delve into the issue of whether an order of forfeiture should have been granted and to use this as a basis upon which to

dismiss the application. In doing so, it misconstrued the actual application before it, and impermissibly granted the respondent relief to which she was not entitled through a backdoor.

ORDER

1. The appeal is upheld with costs.
2. The order of the court a quo dated 18 August 2022 is set aside and replaced with the following:

“1. Clause 2 of the court order of 3 May 2018 is amended to read as follows:

1.1 Division of the joint estate.

1.2 It is recorded that the Defendant is a member of the Government Employees Pension Fund (GEPF) with membership number 9[...]. It is ordered that:

(a) in terms of section 7(8)(a) of the Divorce Act 70 of 1979, 50% of the Defendant’s pension interest in the GEPF calculated as at date of divorce, is assigned to the Plaintiff;

(b) an endorsement is to be made in the records of the GEPF that the 50% is payable to the plaintiff within sixty days of being informed of how the amount must be dealt with in accordance with the Plaintiff’s election.

2 The respondent is ordered to pay the applicant’s costs of the application on Scale A.”

JUDGMENT

NEUKIRCHER J: (Millar J and Kooverjie J concurring)

1] This appeal comes before us by way of leave from the Supreme Court of Appeal (SCA) on petition. It is noted against the order of Raulinga J where he dismissed the appellant's variation application with costs on 18 August 2022. The appeal has been noted against the entirety of the judgment and order, including the order for costs.

Background

2] The appellant and the respondent were previously married in community of property in accordance with the customary laws of the Pedi culture. The marriage was never registered.¹

3] The appellant instituted divorce proceedings in this Division². She failed to enter an appearance to defend and on 3 May 2018, a decree of divorce was granted and the parties' joint estate was ordered to be divided. The order was granted in the absence of the respondent.

4] According to the appellant, at that time the joint estate consisted of various movables, motor vehicles and - most notably - the respondent's pension interest in her pension fund, which appears to be the only asset in the joint estate of any true value.

5] As the joint estate could not be divided, the appellant then brought an application to appoint a liquidator. That application was served personally on the

¹ Section 4(9) of the Recognition of Customary Marriages Act 120 of 1998 provides that failure to register a customary marriage does not affect the validity of that marriage

² Summons was served personally on the respondent on 30 November 2017

respondent on 21 May 2019. On 2 June 2019 the court granted the order – the application was unopposed.

6] On 8 December 2020, the appellant launched an application to clarify the order of 3 May 2018. By this stage, unfortunately, the joint estate was no closer to being divided than two years prior. According to the appellant the reason for this is twofold: firstly because of the respondent's obstructive conduct, and secondly because of the vague manner in which the order frames the division of the joint estate. The details of the respondent's pension fund were not reflected in the order and accordingly the GEPF could not (or would not) pay out.

7] The appellant was thus caught in somewhat of a conundrum: on the one hand, the divorce order entitled him to fifty per cent of the nett assets of the joint estate; but on the other hand, that order had become little more than a brutum fulmen. The only way to ensure proper execution of the order was to clarify paragraph 2.

8] Thus, on 8 December 2020, the appellant launched an application to vary the order of 3 May 2018. The Notice of Motion seeks the following relief:

“1. Clause 2 of the Court Order to be amended as follows:

‘2.1 Division of the joint estate;

2.2 it is recorded that the Defendant is a member of the Government Employees Pension Fund with membership number: 9[...]. It is ordered that in terms of Section 7(8)(a) of the Divorce Act, 1997 (Act No. 70 of 1979) that 50% of the Defendant's pension interest in the Government Employees Pension Fund is assigned to the Plaintiff as at date of divorce. An endorsement shall be made in the records of the Government Employees Pension Fund that the Plaintiff's share of the Defendant's pension interest is payable to the Plaintiff. The Government Employees Pension Fund shall pay to the Plaintiff his share of

the Defendant's pension interest as referred to herein within 60 days of being informed of how the amount must be dealt with in accordance with the Plaintiff's election.”

9] This application was met by fierce opposition from the respondent who not only filed an answering affidavit, but also a counter-application in which she, inter alia, sought a rescission of the order of 3 May 2018.³ The counter-application was withdrawn by the time the variation application was heard, but the respondent persisted with her opposition to the application. Her opposition eventually informed the dismissal of the application.

10] In essence, the respondent's opposition is premised upon the following, that:

- a) the variation application was brought two years and seven months after the divorce order was granted, which is not within a reasonable time and further no condonation for the delay has been sought;
- b) the marriage was of short duration⁴, it broke down as a result of the appellant's constant lies⁵, and he failed to support her, their children and the common household and he ran up substantial debt. She also argued that the appellant had made no contribution towards her pension fund. Thus, so the argument goes, the appellant will be unduly benefitted were the variation application to succeed and her pension interest to be divided as sought.

11] In its true essence, the opposition to the application amounts to little more than a claim for forfeiture ex post facto.

The court a quo

12] In refusing the application for variation, the court a quo stated the following:

³ This on the basis that no valid customary marriage had been concluded between the parties

⁴ A period of three years

⁵ About his identity, his parents, his family, his financial position

“20. It is evident that the applicant will be unduly benefitted should this court grant the relief sought by the applicant. Having considered all the relevant evidence led by the respondent to prove that she is entitled to a forfeiture order, I am convinced that the respondent has discharged the onus of showing factual undue benefit by the applicant if the forfeiture order is not granted. The respondent has laid a factual basis in relation to what she has contributed to the joint state and in relation to the value that her contribution amounted to as compared to the applicant. I am convinced that the applicant entered into a marriage for sole purpose of benefiting materially. Lastly, it is my considered view that it is within this court’s powers to find in favour of the respondent and grant forfeiture order. It follows that the applicant’s application to vary the existing divorce order ought to fail.”

13] It is trite that, at date of divorce, a marriage in community of property is visited with an order for division of the joint estate⁶ unless an order for forfeiture of benefits is granted in terms of s9(1) of the Divorce Act. This means that, apart from certain exceptions⁷, all assets of the parties at date of their marriage and acquired thereafter fall within the joint estate. By virtue of s7(7)(a) of the Divorce Act, this includes a spouse’s pension interest.

14] Section 7(7)(a) of the Divorce Act states:

“(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.

⁶ The Matrimonial Property Act 88 of 1984 defines a “joint estate” as ‘the joint estate of a husband and wife married in community of property’

⁷ For example s18 of Act 88 of 1984:

“Notwithstanding the fact that a spouse is married in community of property-

- (a) any amount recovered by him or her by way of damages, other than damages for patrimonial loss, by reason of a delict committed against him or her, does not fall into the joint estate but becomes his or her separate property;
- (b) he or she may recover from the other spouse damages in respect of bodily injuries suffered by him or her and attributable either wholly or in part to the fault of that spouse and these damages do not fall into the joint estate but become the separate property of the injured spouse.”

(c) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded."

15] Thus, given that at divorce division of the joint estate is an automatic consequence of a marriage in community of property, and given the provisions of s7(2) of the Divorce Act, strictly speaking an order to that effect is superfluous.

16] Section 37D(1) and (4) of the Pension Fund Act 24 of 1956 provides:

"(1) A registered fund may- ...

(d) deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be-

(i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of the Divorce Act, 1979 (Act 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution..."

In addition, subsection (4) provides as follows:

(a) For purposes of section 7 (8) (a) of the Divorce Act, 1979 (Act 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse-

(i) must be deducted by-

(aa) the pension fund or pension funds named in or identifiable from the decree;

(bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;

(ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b) (ii), the date on which that period expires; and

(iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree..."

17] In keeping with these provisions, s7(8) of the Divorce Act provides:

"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.”

18] In *GN v JN*⁸ the court stated that, given the provisions of s7(7)(a) of the Divorce Act, the pension interest forms an integral part of the joint estate upon divorce which is to be shared between the parties. The entitlement of the non-member spouse to a share of the member spouse’s pension interest is not dependent on s7(8), with the result that if there is no reference in the divorce order to the pension interest, then each party is nevertheless entitled to an amount equal to 50% of the other’s net pension interest. Thus, s7(8) provides simply a mechanism in terms of which the pension fund of the member spouse is statutorily bound to effect payment of that portion of the pension interest assigned to the non-member spouse, as at the date of divorce, directly to the non-member spouse as provided for in s37D(1)(d)(i) of the Pension Fund Act and s21(1) of the Government Pension Law, 1996.⁹

19] The court *a quo* thus concluded:

⁸ 2017 (1) All SA 342 (SCA) par 25-26

⁹ Also *Booyesen v Booyesen* (A267/2018) [2019] JOL 45658 (FB)

“In light of the above, it is concluded that pension interest of the respondent does form part of the joint estate which is subject to division on divorce. Given the parties were married in community of property, it is my view that for all relevant times, during the existence of their marriage, the spouses became co-owners in undivided and indivisible shares of all the assets acquired during the subsistence of their marriage. It follows that each spouse, unless the respondent succeeds in obtaining an order to the effect that patrimonial benefits be forfeited by the applicant in favour of the respondent, either wholly or in part, in line with the provisions of section 9(1) of the Divorce Act, is entitled to an equal share of the joint estate and whatever it entails. The joint estate in the present matter includes pension interest of the respondent as contemplated in section 7(7)(a) of the Divorce Act. Although the court granting a decree of divorce did not make an order declaring such pension interest to be part of the joint estate, it is concluded in the circumstances of this matter that the applicant is entitled to a share in the pension interest of a member spouse.”

20] The court a quo was without question correct. However the court then investigated the respondent’s version for its determination of whether the variation application should be granted: it conducted an excursus on the issue of “whether the applicant will be unduly benefitted if an order of forfeiture is not made or whether forfeiture of the benefits arising out of the marriage in community of property should be granted.” This, with respect, it was not permitted to do for two reasons:

- a) firstly, s9(1) of the Divorce Act is only applicable when a decree of divorce is granted¹⁰;
- b) secondly, the application for rescission was withdrawn by respondent.

¹⁰ Section 9(1): When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage, including a Muslim 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 benefitted.

21] Thus the only application before the court a quo was the one to vary the order for division of the joint estate in order to give proper effect to s7(7)(a), as read with s7(8) of the Divorce Act, as read with s37D of the Pension Fund Act.

22] In my view, the respondent has also misconstrued the purpose of the application: its argument that the application is late is premised on an argument that the variation is sought in terms of Rule 42. But it is not: it is sought to give proper effect to its terms. At best for respondent, perhaps one may make an argument that the original order contains a patent error as the divorce order fails to set out details of the respondent's pension fund - but in my view this construction is unnecessary for the simple reason, as stated in par 7 supra, that the court must ensure that its orders are clear, unambiguous and capable of execution – this one is not and it must therefore be corrected. Thus, no condonation is necessary.

23] But there is also a further issue: the respondent had 2 previous opportunities to contest the relief sought:

a) summons was served personally – she failed to enter an appearance to defend;

b) she similarly failed to defend the application to appoint the liquidator.

24] It is trite that a court may only interfere with a decision in the event of a demonstrable and material misdirection¹¹ of law or fact. In my view that is what occurred here: the court a quo was not at liberty to delve into the issue of whether an order of forfeiture should have been granted and to use this as a basis upon which to dismiss the application. In doing so, it misconstrued the actual application before it, and impermissibly granted the respondent relief to which she was not entitled through a backdoor.

¹¹ S v Hadebe and Others 1997 (2) SA SACR 641 (SCA) at 645 E-F

25] I am of the view that there is no ground upon which a court can conceivably refuse relief to which a party is entitled ex lege. This being so, the appeal must succeed.

Costs

26] Mr Lerm has sought a punitive costs order. His argument is that the respondent remained supine for two and a half years until the application was launched. Her application for rescission was abandoned at the last minute and was, in any event, obstructive¹². Her opposition of the application is also simply opportunistic and an abuse of process as it actually prevents appellant from executing a competent order.

27] I am not of the view that a punitive costs order is warranted in this matter. Respondent's conduct is informed by the advice of her legal representatives.

The Record

28] One last aspect needs discussion and that is the state of the record placed before us. The applicants attorney simply uploaded all documents to CaseLines. The "Record" failed to include the Judgment and order of the court a quo which were eventually found at section 029. The Notice of Appeal was to be found at 0000001-1 together with the other relevant documents. All in all this was wholly unsatisfactory and all three judges wasted time trolling through unnecessary and irrelevant documents. Because this was not canvassed during the appeal this simply serves as a warning to attorneys in future that such conduct may well be visited by an appropriate costs order.

Order

29] The order is:

1. The appeal is upheld with costs.

¹² In re Alluvial Creek Ltd 1929 CPD 532 at 535

2. The order of the court a quo dated 18 August 2022 is set aside and replaced with the following:

“1. Clause 2 of the court order of 3 May 2018 is amended to read as follows:

2.1 Division of the joint estate.

2.2 It is recorded that the Defendant is a member of the Government Employees Pension Fund (GEPF) with membership number 9[...]. It is ordered that:

(d) in terms of section 7(8)(a) of the Divorce Act 70 of 1979, 50% of the Defendant’s pension interest in the GEPF calculated as at date of divorce, is assigned to the Plaintiff;

(e) an endorsement is to be made in the records of the GEPF that the 50% is payable to the plaintiff within sixty days of being informed of how the amount must be dealt with in accordance with the Plaintiff’s election.

- 2. The respondent is ordered to pay the applicant’s costs of the application on Scale A.”*

**B. NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

I agree,

A. MILLAR
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered

H. KOOVERJIE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be _____

For the applicant	:	Adv JH Lerm
Instructed by	:	Naude Dawson Inc.
For the respondent	:	Adv E Prophyl
Instructed by	:	Motsau Mamosali Attorneys Inc.

Matter heard on	:	7 August 2024
Judgment date	:	29 August 2024