IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case number. CA&R 54/2023
Date heard: 20/05/2024
Date delivered: 06/09/2024
Reportable: Yes/No
Circulate to Judges: Yes/No
Circulate to Magistrates: Yes/No

In the matter between:

S[...] J[...] W[...] **APPELLANT**

and

V[...] W[...] (BORN M[...]) **RESPONDENT**

CORAM: Williams J et LEVER J

JUDGMENT

WILLIAMS J:

1. This is an appeal against the refusal by the Regional Court, Kimberley, to grant an order in terms of s7(8)(a)(i) of the Divorce Act 1979 (the Act). The appeal is not opposed.

2. The appellant, who was the plaintiff in the action, and the respondent were married in community of property on 27 September 1997. Three children were born of the marriage of whom two were still minors at the date of the divorce on 22 September 2023, a son born on 7 December 2008 and a daughter born on 12 December 2008.

3. In his particulars of claim the appellant pleaded *inter* alia that he is entitled to 50% of the respondent's pension interest in the Government Employees Pension Fund, calculated as at date of divorce, pursuant to the provisions of s 7(8)(a) (i) and (ii) and s 7 (8)(b) of the Act.

4. In addition to claiming an order of divorce, the appellant also sought the following:

4.1 Division of the joint estate;

4.2 That both parties retain the parental responsibilities and rights regarding the care of the minor children;

4.3 That the minor children reside primarily with the respondent;

4.4 That the parties retain the parental responsibilities and rights regarding contact with the minor children, together with the details setting out the appellant's contact with the minor children.

4.5 That both parties retain the parental responsibilities and rights regarding the guardianship of the minor children;

4.6 That the issue of maintenance for the minor children be referred to the Maintenance Court;

4.7 That an endorsement be made in the records of the Government Employees Pension Fund that 50% of the respondent's pension interest in the pension fund be paid to the appellant within 60 days after receipt of written notification by the appellant; and

4.8 Costs of suit in the event of the action being defended.

5. The divorce action was not opposed by the respondent although it appears from the record of the proceedings that she had appointed an attorney to hold a watching brief.

6. It transpired during the testimony of the appellant and upon questioning by the court *a quo* that the appellant had been unemployed since 2015 and had not paid any maintenance towards the minor children since that time.

7. As a result the court *a quo* held in its judgment that:

". . . as far as the application that has been made by the applicant for an order that defendant's pension fund be ordered to pay 50% or any other percentage of the plaintiff's pension, interest or benefit in her fund is hereby refused for the reasons that are follow.

The main reason being, for that matter that the parties separated as way back as 2016. That the plaintiff has not been employed since 2012 and the plaintiff in his own evidence last maintained their two children in 2015 and that therefore the maintenance of these two children has for the past 8 years or so being solely on the shoulders of the defendant and that even going forward there is no indication that the defendant would be maintaining any of these children, if they are still dependent children and whilst the court is not making any order for the forfeiture of benefits.

It would be not in the interest of justice and fairness and particularly in the interest of these children, the dependent children, to order the payment of any percentage from the pension fund of the defendant, I mean, from the defendant's pension fund, as this would visit even an additional responsibility and burden on the defendant's part and the plaintiff would definitely not only be unduly enriched as against the defendant but it would be to the prejudice of also those dependent children.

The court is of the view that if this is an issue that can be dealt with by the parties amongst themselves when they divide their joint estate in the absence of any agreement, then it is an issue that can be handled by a receiver if appointed."

8. The orders made by the court *a quo* are as follows:

"1. That the bonds of the marriage subsisting between the Plaintiff and the Defendant be and are hereby dissolved.

2. Division of the joint estate.

3. The application for an order that defendant's pension fund be order to pay 50% or any other % of the defendant's pension interest benefit in the fund is refused.

4. No order is made in respect of cost."

9. As can be seen from the above, no orders have been made regarding the care, contact and maintenance of the minor children. We were not informed as to whether this was an oversight which has been corrected by the court *a quo,* or not. We do however intend to deal with these aspects as far as it may be necessary in the order made herein.

10. As stated herein, the appeal lies solely against the court *a quo's* refusal to order the payment of 50% of the respondent's pension interest to the appellant. It is therefore necessary to have regard to the relevant section of the Act which deal with the pension interest of a party to a divorce i.e. s7(7) and s 7(8)(a) of the Act.

11. S 7(7) of the Act reads as follows:

> *"(7)(a) In the determination of the matrimonial 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.*
>
> *(b) 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 an nuptial contract by which community of property, community of profit and loss and the accrual system are excluded.*
>
> *(8) 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"*

(s7(7) and s 7(8) of the Act should be read together with the Pension Fund Act 24 of 1956 which has been amended in s37 D(4)(a) – (d) to provide for payment of the awarded benefit to the non-member spouse after a divorce)

12. It is clear from s 7 (7)(a) that for purposes of an equitable division upon a divorce, the pension interest of a party is deemed to be part of his assets, - thus part of the joint estate. It is trite that parties to a marriage in community of property are each entitled to one half of the joint estate upon dissolution of the marriage unless they agree otherwise or the Court makes an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other in terms of s9 of the Act.

13. The refusal by the court *a quo* to grant an order in terms of s 7(8)(a)(i) of the Act in effect amounts to a forfeiture of the appellant's share of the respondent's pension interest or benefit in favour of the respondent, in circumstances where the respondent has not sought a forfeiture order in this regard. In addition, no

evidentiary basis had been laid for the justification of such an order. The fact that one party benefits above the other as a result of unequal contributions made during the course of a marriage in community of property is one of the inevitable consequences of the particular marital regime, unless the benefit is undue. The burden of proving that the other party would be unduly benefited rests on the party who seeks the forfeiture order (see *Engelbrecht v Engelbrecht 1989 (1) SA 567 (c) at 601)*. The court *a quo* was clearly not entitled to refuse the appellant's application in terms of s 7(8) (a)(i) on the basis that he would be unduly benefited.

14. The court a quo's concern that the interests of the minor children would not be served should such an order be granted, is likewise unfounded. It loses sight of the fact that the respondent, who is the main caregiver of the children, would be highly unlikely to receive a contribution from the unemployed appellant towards the maintenance of the children if the appellant does not receive payment of half of her pension interest. Leaving aside for the moment the new two pot retirement system which has recently been implemented, the respondent herself would only be entitled to her pension benefits once it accrues to her and her retention of 100% of the pension interest would be of no assistance in maintaining the children (one who has in the meantime attained majority and the other currently 15 years old) until then. The maintenance court would in my view be best suited to hold an enquiry and deal with the issue of the minor children's maintenance.

15. The court *a quo* has exercised its discretion injudiciously and on the wrong principles and as a result the refusal of the appellant's claim in terms of s 7(8)(a)(i) should be set aside.

16. As mentioned herein, the order made by the court *a quo* on 22 September 2023 does not make provision for the care, contact and maintenance rights and responsibilities relating to the minor children. Our order herein will encompass these aspects, as claimed in the appellant's particulars of claim, in the event the

original order has not yet been varied. I may just mention that the appellant's particulars of claim and prayers have been considered by the Family Advocate and has been endorsed as being in the best interest of the minor children. In our view there is nothing before us which detracts from the opinion held by the Family Advocate.

The following orders are made:

1. **The appeal succeeds.**

2. **Paragraph 3 of the Regional Court order under case number NCKBY/RD 153/2023 is set aside and replaced with the following:**

   "3.1 The plaintiff is entitled to 50% (fifty percent) of the defendant's pension interest in the Government Employees Pension Fund with identity number 6[...], calculated as at date of divorce pursuant to the provisions of s 7(8)(a)(i) and (ii) and s7(8)(b) of the Divorce Act, as amended.

   3.2 An endorsement shall be caused to be made in the records of the Government Employees Pension Fund with identity number: 6[...], that 50% of the defendant's pension interest held and administered by the Government Employees Pension Fund be paid to the plaintiff.

   3.3 The Government Employees Pension Fund is directed to pay to the plaintiff 50% of the defendant's pensions interest within 60 days after receiving written notification from the plaintiff that he elects to receive a cash benefit."

3. **In addition to the above and only in the event the original court order has not been supplemented to this effect, the following orders are made:**

“5. The plaintiff and the defendant retain the parental responsibilities and rights regarding the care of the minor children, S[...] W[...] and N[...] W[...], as contemplated in Section 18(2)(a) of the Children’s Act, Act 38 0f 2005, subject to the following:

5.1 The minor children will reside primarily with the defendant.

5.2 The defendant will be the primary caregiver of the minor children and will be responsible for the day-to-day care of the minor children.

5.3 The plaintiff and the defendant retain the parental responsibilities and rights regarding contact with the minor children, as contemplated in Section 18(2)(b) of the Children’s Act 38 of 2005, subject to the following:

5.3.1 The plaintiff will take the minor children with him, at his own expense, every alternative weekend from 17:00 on a Friday until 17:00 on the Sunday.

5.3.2 The plaintiff will take the minor children with him, at his own expense, every alternative short school holiday. For these purposes the March/April and September/October school holidays are regarded as “short school holidays”.

5.3.3 Contact every alternative long school holiday. The December/January school holiday will rotate between the parties.

5.3.4 The plaintiff will maintain contact with the minor children by electronic means, telephonic calls and video calls. Electronic contact will only take place at reasonable times during Monday to Sunday at 16:00 pm until 18:00 pm.

5.4 The plaintiff and the defendant retain the parental responsibilities and rights regarding the guardianship of the minor children, as contemplated in Section 18(2)(c), 18(3) and 18(5) of the Children's Act, Act 38 of 2005 (i.e. the parties are the co-guardians of the minor children).

6. The issue of maintenance for the minor children is to be referred to the Maintenance Court for adjudication."

CC WILLIAMS
JUDGE

I concur

L G LEVER
JUDGE

For Appellant: Adv M T Maluleke
Mr LX Nana
Legal Aid SA