

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 56197/20

1. REPORTABLE: NO	
2. OF INTEREST TO OTHER JUDGES: NO	
3. REVISED: NO	
28 August 2025	
DATE	SIGNATURE

In the matter between:

E R D M

Plaintiff

And

MM

Defendant

JUDGMENT

MOGALE, AJ

Introduction

[1] This is a legal divorce action in which the Defendant has opposed the application for relief concerning the dissolution of the estate.

Background

[2] The parties were legally married in community of property on 11 December 1989. The marriage remains in effect. Since 2013, the parties have not cohabited as husband and wife.

[3] Two children were born of the parties' marriage, both of whom have attained the age of majority and are self-supporting.

[4] The parties are in agreement that the marriage has irretrievably broken down and that a decree of divorce ought to be granted, subject to the approval of the Honourable Court. The Plaintiff filed an affidavit of evidence in support of her application.

[5] The Plaintiff issued a summons for divorce on or about 27 October 2020. In terms thereof, the Plaintiff claimed, inter alia, division of the joint estate and payment of one-half of the Defendant's pension interest held in the Government Employees Pension Fund (GEPF).

[6] The Defendant entered an appearance to defend and delivered a plea and counterclaim. In his counterclaim, the Defendant sought, inter alia, payment of one-half of the Plaintiff's pension interest held in the GEPF.

[7] After the close of pleadings, and on 1 April 2022, the Defendant retired. Upon retirement, the Defendant received a gratuity from the GEPF in the amount of R 1 088 420.48. The Defendant has retained 50% of the said amount pending the outcome of the divorce action. In addition, the Defendant currently receives a monthly pension payment from the GEPF in the amount of R 24 570.50.

[8] Upon becoming aware of the Defendant's retirement, the Plaintiff amended her particulars of claim. She now seeks half of the monthly pension payments received by the Defendant from the GEPF, as well as half of the gratuity received by the Defendant upon retirement in April 2022.

The facts

[9] At the commencement of the divorce proceedings, the Defendant was a member of the GEPF and possessed a pension interest as specified in section 7(1) of the Divorce Act (herein referred to as “the Act”).¹

[10] The pension fund in which the Defendant has an interest is a Government Employees Pension Fund as contemplated in section 1(1) of the Pension Funds Act (herein referred to as “the pension fund”).²

[11] In terms of section 7(7)(a) of the Act, the Defendant’s interest in the pension fund is deemed to form part of the joint estate of the parties at the dissolution of the marriage.

[12] The Plaintiff’s amended particulars of claim state that, as of 1 April 2022, the Defendant received R 1 088 420.48 from the GEPF. Consequently, the Plaintiff is entitled to a 50% share of the joint estate, amounting to R 544 210.24, plus interest at 10.5% from the date of payment from the GEPF.

[13] From the same GEPF, the Defendant currently receives a monthly income of R 24 570.50; consequently, the Plaintiff is also entitled to a 50% share, amounting to R 12 285.25 per month.

[14] The Defendant contends that the Plaintiff is not entitled to a share of the Defendant’s monthly payment in the amount of R 12 285.25 post the divorce. Furthermore, the Plaintiff should not be granted the payment associated with the R544 210.24 plus interest at 10.5% without accounting for the tax paid on the gratuity of R1 088 420.48. The Plaintiff should similarly bear responsibility for the taxes paid.

Oral submissions by the Plaintiff

¹ Act 70 of 1979.

² Act 24 of 1956.

[15] On behalf of the Plaintiff, Advocate Marx du Plessis contended that a distinction exists between pension interest and pension benefit. This differentiation is particularly relevant during divorce proceedings to determine how the pension asset should be divided, regardless of whether the parties have retired.

[16] The two definitions are described in terms of section 1 of the Pension Funds Act:

“pension interest”, in relation to a court order granted under section 7(8)(a) of the Divorce Act, or a court order granted in respect of the division of assets of a marriage according to the tenets of a religion, means, in relation to a party who is a member of a fund, that member's individual account or minimum individual reserve, as the case may be, determined in terms of the rules of that fund, on the date of the court order;

“Pension benefit” in relation to a fund means any amount payable to a member or beneficiary in terms of the rules of that fund.

[17] Section 1(1)(a) of the Divorce Act defines pension interest in relation to a party to a divorce action who—

“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”

[18] The distinction of the two words has also been described in by the Government Employees Pension Law³ as follows:

“Pension benefit means an annuity or gratuity, or both an annuity and a gratuity, as the case may be”

“Pension interest, in relation to a member of the Fund who is a party to an action for divorce or for the dissolution of a customary marriage means the benefits to which that member would have been entitled in terms of the rules of the Fund if the member's

³ 1996 (Proclamation No.21 of 1996).

membership of the Fund were to be terminated on the date of the divorce or the dissolution of a customary marriage on account of the member's resignation from the service of the employer;"

[19] In terms of section 7(7)(a) of the Divorce Act, a pension interest, before retirement, forms part of the joint estate of spouses married in the community of property. In terms of section 7(8) of the Divorce Act, the court is empowered to order that a portion of a member's pension interest be assigned to the non-member spouse upon the divorce.

[20] The Defendant retired and received a pension benefit; therefore, he is no longer a member of the GEPF. The moment the Defendant received his pension benefits, the pension interest ceased to exist and was converted into a pension benefit. From their joint estate, the Plaintiff has a right to claim or receive future income, including half of gratuities, because sections 7(7) and 7(8) of the Divorce Act are no longer applicable.

[21] It was additionally contended that the Defendant and GEPF's failure to notify the Plaintiff of the Defendant's retirement consequently deprived the Plaintiff of the opportunity to invoke Rule 14 of the GEPF. As a result, the only applicable remedy is for the court to order the Defendant to make a monthly payment to the Plaintiff equivalent to half of the annuity payment received.

[22] Both the Plaintiff's and the Defendant's legal representatives argued based on two legal principles during their submissions, which are *De Kock v Jacobson and Another*⁴ and *CM v EM*.⁵

[23] Advocate Marx du Plessis argued that in *De Kock* above:

"*In casu*, the applicant's right to the pension accrued before the divorce, in that the right accrued a month after the retirement of the applicant in July 1996, and section 7(7) of the Divorce Act had no application thereto. In other words, the pension interest

⁴ 1999 (4) SA 346 (W).

⁵ [2020] 3 All SA 1 (SCA).

was converted into a right. section 7(7) of the Divorce Act does not apply because it refers only to a pension interest and not to an accrued right.”⁶

“The applicant was a member of the pension fund prior to his retirement and ceased being such a member upon his retirement. The definition of pension interest refers to a party to a divorce action who is a member of a pension fund. As appears from the rules referred to above, at the time of the divorce, the applicant was not a member of a pension fund. Thus, the provisions of s 7(7) of the Divorce Act have no application to the facts as stated in the stated case.”⁷

[24] She argued that if this court considers the meaning of pension interest and the decision above, the applicant’s right to the pension accrued before the divorce should form part of the community of property. Therefore, the Plaintiff is also entitled to 50% of the Defendant’s monthly pension income.

[25] The Plaintiff further argued that the Supreme Court of Appeal reaffirmed the approach and finding in *De Kock* in the matter of *CM v EM*⁸ where in it was held that:

“the court in *De Kock* concluded that there was no logical or legal reason why both the cash component and the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce. [38] I align myself fully with this reasoning and see no reason why it cannot extend to the case at hand...” (footnotes omitted)

[26] In light of this decision, it is clear that the gratuity received by the Defendant from GEPF upon his retirement constitutes part of the joint estate, and the Plaintiff is entitled to a 50% share of it. Similarly, the monthly pension payments form part of the joint estate, and the Plaintiff is entitled to a 50% share of it. Therefore, the Plaintiff is also entitled to 50% of the Defendant’s monthly pension accrued benefit received from the GEPF.

Oral submission on behalf of the Defendant

⁶ *De Kock* above n 4 at 349A-B.

⁷ *De Kock* above n 4 at 349F-G.

⁸ *CM v EM* above n 5 at para 37-38.

[27] On behalf of the Defendant, Advocate Raqowa contends that the joint estate be divided in half, including the pension interests of both parties, during the divorce proceedings.

[28] The court, when determining the division of the estate, should consider the date of the divorce decree, which terminates the marital partnership, rather than the date of the Defendant's retirement. The dissolution of the marriage signifies an appropriate point at which to divide the estate.

[29] The Defendant was aware at the time of his retirement that he was married in community of property, and the gratuity forms part of the joint estate. He did not commit any fraud by concealing the Plaintiff's half share; instead, he retained the funds pending the finalisation of the divorce.

[30] It was argued that the Plaintiff has no authority to stipulate the amount to be paid to the Plaintiff and the interest. Since the provisions of section 7 of the Divorce Act are no longer applicable in this matter, the Plaintiff is entitled to the benefit from the division of the joint estate as the marriage is in community of property. The liquidator might be appointed to distribute the estate equally.

[31] The Plaintiff is not entitled to 50% of the Defendant's future monthly income beyond the date of the divorce. The Defendant's monthly income of R 24 570.50 constitutes part of the joint estate. Therefore, the Plaintiff is entitled to 50% of this amount, which should be determined as of the date of the divorce, and similarly, should bear responsibility for the taxes paid.

[32] In contrast, advocate Raqowa contended that the Plaintiff incorrectly relied on this decision as the court in *De Kock* did not direct that the non-member spouse was entitled to 50% of the monthly annuities paid post the date of divorce. The import of the judgment was simply that the monthly annuity is no different to a spouse's salary, and if it was due before divorce, then it fell into the joint estate. He further argues that there is nothing controversial about this conclusion because the amount payable after the date of divorce would not, on the reading of *De Kock*, fall into the joint estate.

[33] In light of this decision, it is clear that the gratuity received by the Defendant from GEPF upon his retirement constitutes part of the joint estate, and the Plaintiff is entitled to a 50% share of it. Similarly, the monthly pension payments form part of the joint estate, and the Plaintiff is entitled to a 50% share of it.

[34] The Defendant contended that *CM v EM* is entirely distinguishable from the current case, as Maya P (at the time) was managing a living annuity, which constitutes a different form of investment compared to the monthly income payable by the pension fund. Furthermore, the parties in *CM v EM* were married out of community of property with accrual, and the court was considering principles related to the calculation of the estate's accrual.

[35] The Plaintiff does not have any legal or factual basis to receive half of the Defendant's future monthly payments after the divorce. The Defendant's pension benefit already received has accrued, but the Defendant is no longer a member of a pension fund; therefore, sections 7(7) and 7(8) of the Act are no longer applicable.

Issues of common cause

[36] The parties agree that their marriage has irretrievably broken down and that a decree of divorce should be granted. The parties also agree that there should be an equal share of the joint estate. The Defendant has retained 50% of the pension gratuity received pending the outcome of the divorce action.

[37] The Plaintiff is currently employed as a nurse and is a member of the GEPF. There is an endorsement made on the record of her pension fund for the Defendant's 50% pension benefit.

Issues to be decided

[38] This court must consider whether the Plaintiff is entitled to receive payment in the amount of R 544 210.24, being half of the gratuity received by the Defendant upon his retirement, together with interest thereon at 10.5% per annum from 1 April 2022 to

the date of payment. Further, whether the Plaintiff is entitled to 50% of the Defendant's monthly pension income.

The legal principles

[39] Parties married in community of property, and pursuant to the matrimonial regime of in community of property, the spouses own the assets of the joint estate in an equal undivided share, meaning that the assets cannot be divided while the marriage subsists, and no rights can accrue exclusively to one of the spouses while the marriages subsist.⁹ The general rule is that the entirety of the assets of both spouses, both prior to and during the marriage, form part of the joint estate.¹⁰

[40] Section 1(1)(a) of the Divorce Act defines the pension benefit as follows:

“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;”

[41] Section 1 of the Pension Law defines benefit as an annuity or gratuity or both annuity and gratuity, whichever the case may be. In *GN v JN*¹¹ the Supreme Court of Appeal said the following regarding the pension interest: “the language of section 7(7)(a) is clear and unequivocal. It vests in the joint estate the pension interest of the member spouse for the purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce.”

[42] In *Government Employees Pension Fund v Naidoo and Another*,¹² it was held that:

“Where a pension benefit accrues to a member of the Government Employees Pension Fund who is married in community of property, the benefit accrues to the joint estate

⁹ Robinson “Matrimonial Property Regimes and Damages: The Far Reaches of the South African Constitution” (2007) 3 *PER* 3.

¹⁰ *Id* at 4.

¹¹ 2017 (1) SA 342 (SCA) at para 26.

¹² 2006 (6) SA 304 (SCA) at headnote.

and the non-member spouse acquires an undivided half-share in the benefit. Upon divorce, the non-member spouse becomes entitled to payment of his or her half-share of the benefit. . .”

[43] In *Eskom Pension and Provident Fund v Krugel*,¹³ the court held that in the event that the pension benefit has been paid, at such time the “pension interest” equates to a “pension benefit” and the provisions of sections 7(7) and 7(8) are no longer applicable.

[44] With section 7(1) and 7(8) no longer applicable, in *De Kock v Jacobson and Another*¹⁴ it was held that:

“The question then remains whether the right to the pension is part of the community of property. There is to my mind no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce.”

And further, “The right to a pension is a right which rests in the parties to a marriage in community of property in undivided shares.”¹⁵

[45] The Supreme Court of Appeal reaffirmed this approach in *CM v EM*,¹⁶ where the following was stated:

“The court cited with approval two judgments. First was *Clark v Clark*, in which the court accepted that a spouse’s interest in a pension which had not yet accrued did indeed form part of the community estate, as did a pension right which had accrued. The second one was a case of this court, *Commissioner for Inland Revenue v Nolan’s Estate*, which reaffirmed that the right to a pension is a right which vests in the parties to a marriage in community of property in undivided shares. The court in *De Kock* concluded that there was no logical or legal reason why both the cash component and the accrued right to the pension should not form part of the community of property existing between the parties prior to the divorce.”

¹³ 2012 (6) SA 143 (SCA) at para 11.

¹⁴ *De Kock* above n 4 at 349G-H.

¹⁵ *Id* at 350C.

¹⁶ *CM v EM* above n 5 at para 37.

[46] It follows then that if a pension benefit is paid before the finalisation of the divorce proceedings, the pension benefit will form part of the joint estate along with the other assets of the joint estate, and this is done to determine the patrimonial benefits to which the parties are entitled as at the date of their divorce.

Evaluation of the application

[47] I find the Plaintiff's 10.5% interest claim to lack a legal basis and not be sound in law. The joint estate can only be divided at divorce, and in this case, the gratuity paid out to the Defendant by the pension fund forms part of the joint estate, and therefore, no interest can be claimed on it.

[48] As alluded to in *B.S.M v N.A.M*:¹⁷

“... the pension interest is simply a value calculated as of the date of divorce. It is that “value” which falls into the reckoning of the total value of the basket of assets, along with all the other assets in the joint estate. The marriage between the two parties still subsists. The gratuity received by the defendant still forms part of the joint estate; interest can only be claimed as of the date of the divorce.”

[49] It is thus established that the reciprocal duty of support terminates at divorce as per the case referenced by the Defendant.¹⁸ In that case, the reciprocal duty of support was determined concerning a spousal maintenance claim, as is the case with other instances where the reciprocal duty of support applies.¹⁹ As correctly put by the Defendant, in this case, the Plaintiff is not claiming spousal maintenance. Instead, she's asserting her right to claim in the joint estate of the parties. Upon dissolution of a marriage in community of property, both parties have a right to claim their half share of the joint estate, which is inclusive of all the assets minus liabilities accumulated during the marriage. Therefore, the reciprocal duty of support finds no application in this case.

¹⁷ [2016] ZALMPPHC 2 at para 11.

¹⁸ *Ex Parte Standard bank Ltd and Others* 1978 (3) SA 323 (R).

¹⁹ See also *Strauss v Strauss* 1974 (3) SA 79 (A); *Schutte v Schutte* 1986 (1) SA 872 (A); *Zwiegelaar v Zwiegelaar* 2001 (1) SA 1208 (SCA); *WB v PB* 2024 JDR 4142 (FB) and others.

[50] The Defendant concedes that the gratuity amount forms part of the assets of the joint estate as accrued upon retirement, and he further concedes that this amount should be shared between the parties, however, the Defendant's assertion, relying on Rule 14.2.6 of the Pension Law and GEPF Rules, that the annuity is separate from the gratuity and should be treated separately, is misplaced. The benefits accrued to the Defendant at retirement encompass the monthly annuity payments.

[51] Paragraph 17 of the Defendant's heads or arguments reads thus:

"From the reading of the Pension Law and Rules, it becomes clear that the defendant is only entitled to the annuity before or on the last day of each month. Before then, the annuity is not due, with the result that he has no right to claim it."

Therefore, the term "payable" in Rule 14.2.6 does not equate to when the entitlement accrues. The right to the annuity accrues at retirement, not before or on the last day of each month. This interpretation by the Defendant is incorrect when regard is also had to section 1 of the Pension Law, which defines a benefit as an annuity, a gratuity, or both, whichever the case may be. The benefits accrued at retirement, and as per *CNN v NN*,²⁰ if the member receives the benefit during the marriage, such benefit will constitute part of their joint estate if married in community of property or part of the growth of their estate if married with the accrual system.

[52] It is therefore not the case that the entitlement to the annuity only accrues when it is payable. There is no legal basis upon which the annuities can be said to accrue at every month like a monthly salary.

Conclusion

[53] Having concluded that the monthly annuity payments do form part of the joint estate, I am of the view that the court is not in an informed position to make an equitable order regarding the division of the joint estate, and is, therefore, in no position

²⁰ 2023 (5) SA 199 (GJ) at para 19.

to order that the Plaintiff receive 50% of the Defendant's pension monies (both the gratuity and the annuity). The order can only be granted in cases where the parties have reached a settlement, and the court is able to order such. However, in cases where the parties are not *ad idem*, I concur with the Defendant's submission that the services of a liquidator are warranted.

[54] In *M.P v P.G.P.*,²¹ referencing *Botha NO v Deetlefs and Another*,²² the court stated that:

"Where parties cannot agree on how to divide the joint estate, then either one or both of them may approach the courts for the appointment of a receiver and liquidator."

At para 21, the court went further and stated:

"However, in exercising its discretion, a Court should also have regard to the nature of the estate and the extent of the dispute as to division. For instance, in the case of *Schoeman v Rokeby Farming Co (Pty) Ltd* 1972 (4) SA 201(N) at 206D-G the Court, in deciding whether or not the size of the joint estate justified the appointment of a receiver and liquidator, held that:

'[The Plaintiff] could claim the appointment of a liquidator ... In this case, however, there does not seem to be any practical purpose in doing so. 'There are no difficulties with regard to capital contributions, and it is simply a question of determining the expenses that have been incurred in the farming operations. The farming activities do not appear to have been particularly complex, nor did they extend over a long period. The partnership has been of a very restricted nature. In these circumstances, it appears to me to be unnecessary to go through the formality of having a liquidator appointed'"

[55] It is my view that the appointment of a liquidator is warranted to ascertain and realise the assets of the joint estate, as there is not enough information placed before the court to enable it to make such a determination. On the face of it, the Plaintiff's calculation is too simplistic. It does not take into account other actuarial factors that could come into play, such as tax implications (if the income from your annuity exceeds

²¹ [2023] ZAGPPHC 1845 at para 20.

²² 2008 (3) SA 419 (N) at para 15.

a certain tax threshold, tax is payable on that amount), the calculation methods of the fund, and so forth.

[56] Having regard to the fact that parties are in agreement that the marriage has irretrievably broken down and that a decree of divorce ought to be granted, I am satisfied that a proper case has been made out for the order to be granted.

[57] As a result, the following order is made:

1. A decree of divorce is granted.
2. The division of the estate is postponed sine die.
3. The Plaintiff pays the costs of suit.



K MOGALE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing: 28 July 2025
Date of judgment: 28 August 2025

Appearances

Applicants' council: Z MARX DU PLESSIS
Instructed by: SHAPIRO & LEDWABA INC

Respondents' council: Z RAQOWA
Instructed by: KHOMOTSO MAKHURA ATTORNEYS