IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Not reportable
Case no: A178/2024

In the matter between

J[...] M[...] M[...]	**APPELLANT**
and	
M[...] R[...] M[...]	**FIRST RESPONDENT**
TRANSNET RETIREMENT FUND	**SECOND RESPONDENT**

Neutral citation: *M[...] v M[...]* (A178/2024) [2025] ZAFSHC 334 (28 October 2025)
Coram: REINDERS ADJP and CHESIWE J
Heard: 12 May 2025
Delivered: This judgment was handed down in open court on 28 October 2025 and electronically by circulation to the parties' representatives by email, and released to SAFLII.

Summary: Appeal - divorce - order to vary the initial divorce order in relation to the division of the pension fund benefit - the applicability of the *expressio unius est exclusio alterius* principle.

ORDER

The appeal is dismissed.

JUDGMENT

Chesiwe J (Reinders ADJP concurring)

[1] This is an appeal against an order made by the Regional Court, Bloemfontein on 8 December 2023. The appellant was the defendant in a divorce action in that court, whilst the first respondent was the plaintiff. On an undefended basis, the trial court on 19 January 2023, granted a decree of divorce together with ancillary relief. At the request of the first respondent and by way of an opposed application (the application), the Regional Magistrate on 8 December 2023 amended the said order. It is this order for amendment that is appealed by the appellant. I might mention that the second respondent in this appeal, Transnet Retirement Fund (Transnet}, was the first respondent in the application.

[2] The order granted on 19 January 2023 ordered the following:

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

2. Divison of joint estate.

3. .. .

4. .. .

5. In terms of sec 7(8)(a)(i) of the Divorce Act 70 of 1979 ,(50%) of the Plaintiffs pension interest in the GOVERNMENT EMPLOYEES PENSION FUND due or assigned to the Defendant is to be paid to him when any such pension benefits accrue to the Plaintiff.

6. In terms of sec 7(8)(a){ii) of the Divorce Act 70 of 1979, an endorsement should be made on the records of the abovementioned Pension Fund that (50%) of the pension interest of the Plaintiff is payable to the Defendant.

7. In terms of sec 37(D)(4)(b)(ii) of the Pensions Funds Act 24 of 1956 the abovementioned Pension Fund is ordered to pay an amount equal to (50%) of the value of the Pension benefit as on the date of divorce: DIRECTLY to the

defendant in accordance with the rules and regulations of the said Pension Fund.'

[3] The order dated 8 December 2023 supplemented the aforementioned order. The Regional Court magistrate, in a comprehensive written judgment, furnished her reasons therefore (to be dealt with herein below), and para 37 thereof reads:

> 'Accordingly, the court order dated 19 January 2023 is varied in that the following is inserted after paragraph 7 thereof:
>
> 1. In terms of Section 7(8)(a)(i) the Divorce Act 70 of 1979, 50% of the Defendant's pension interest in the TRANSNET RETIREMENT FUND with identity number 7[...], due or assigned to the Plaintiff is to be paid to her when any such pension benefits accrue to the Defendant.
> 2. In terms of Section 7(8)(a) (ii) of the Divorce Act 70 of 1979, an endorsement should be made on the records of the above -mentioned Pension Fund that 50% of the pension interest of the Defendant with the above-mentioned membership number is payable to the Plaintiff.
> 3. in terms of section 37D(4)(b)(ii) of the Pension Fund Act 24 of 1956 the above -mentioned Pension Fund is ordered to pay an amount equal to (50%) of the value of the Pension benefit as on the date of divorce: DIRECTLY to the Plaintiff in accordance with the rules and regulations of the said Pension Fund.'

[4] The court order of 8 December 2023 effectively supplemented the original order in that Transnet was ordered and/or instructed how to deal with the appellant's part of his pension fund.

[5] As mentioned, it is against the aforementioned amended order that the appellant appeals. It is noteworthy to mention that notwithstanding prima facie service of the notice of set down upon the plaintiff's attorneys in the trial court, there was no appearance before us on behalf of the first respondent. The second respondent likewise did not oppose the appeal. This, however, does not mean that the appeal should automatically succeed. We were provided with able heads by counsel appearing for the appellant, for which we are indebted.

[6] The notice of appeal relied on various grounds. It was averred, amongst others, that the trial court: erred by finding that the parties' intention was to divide the assets of the joint estate; failed to have proper regard to the wording of the court order dated 19 January 2023 and misdirected itself by accepting that para 2 of the court order of 19 January 2023 made provision for the entire joint estate (including the parties respective pension funds). It was further averred that paras 5 to 7 of the court order, dated 19 January 2023, militated against an interpretation that required the division of the entire joint estate. Relying on the maxim '*expressio unius est exclusio alterius*' it was argued that by specifically including the appellant's right to share in the first respondent's pension fund in the court order, it expressly excluded the first respondent's corresponding interest in the appellant's pension fund.

[7] Section 7(7)(a) of the Divorce Act 70 of 1979 (the Divorce Act) provides that:

> '(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.
>
> (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 antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.'

[8] The court in *C.N.N v N.N*[1] made a clear distinction in respect of pension fund interest and pension fund benefits by holding as follows:

[1] *C.N.N v N.N* [2023] ZAGPJHC 208; 2023 (5) SA 199 (GJ).

> '[19] ... The term 'pension interest' is technically defined in such a way as to characterise the contributions plus investments held by funds on behalf of their member as their benefits differently depending on events that entitle member spouses to claim these benefits. If the member spouse is entitled to receive his or her benefit any time before the divorce due to dismissal, retirement, retrenchment, or resignation as prescribed by the rules of his or her fund, this benefit is referred to as a pension benefit and does not constitute part of the member's estate for as long as it is held by the fund. If the member receives the benefit during the marriage, such benefit will constitute part of his or her joint estate if married in community of property or growth of his or her estate if married with the accrual system.'

[9] The appeal lapsed and the appellant, by way of a formal application, requested condonation for the late prosecution and reinstatement of the appeal. On 14 April 2025, this Court granted the relief so sought. Suffice it to say that the gist of the appellant's contentions related to financial constraints to have proceeded earlier with the appeal.

[10] In the judgment by the magistrate who varied the order, after having considered the papers filed by the parties and the submissions made, she reasoned as follows:

> '[26] Now, at first glance, paragraph 2 [of the order] makes it clear that the joint estate is to be divided between the parties and that in my view, includes the Second Respondent's (the appellant in casu) pension interest in the Transnet Retirement Fund...
>
> …
>
> [29] Now it is so that the Applicant initially prayed for in her particulars of claim that each party retain their respective pension funds. Upon viewing this in context with the plea and counterclaim and the eventual court order made, the most sensible interpretation is that parties are to divide all assets in the joint estate.

[30] In my view, had the words "division of the joint estate" been excluded from the court's order, it would have been a clear indication that division would only apply to the Applicant's pension fund as seen in paragraphs 5-7.

[31] In *casu*, this is not the case, the words were specifically included. It is also not in dispute that the Second Respondent is indeed a member of the First Defendant which is defined as a pension fund in terms of Section 1 of the Pension Funds Act and that the said funds have not yet been claimed and are in fact, still available.

[32] It cannot be asserted that the Applicant waived her right to claim from the Second Respondent pension fund in light of the order for the division of the joint estate and full context and background of this matter.'

[11] From the above extracts of the judgment it is evident that the magistrate concluded that, as the parties were married in community of property, division of the joint estate would entail that they were to share equally in the division of moveable and immovable property. She was well aware of the principles set out by the Supreme Court of Appeal in *Ndaba v Ndaba*[2] (*Ndaba*). Suffice it to say that the majority of the court found that a pension interest of a party is an integral part of the joint estate which is to be shared.[3] The court rejected the maxim '*expressio unius est exclusio alterius*' upon which reliance was placed. The court held:

'In any event, there is a more fundamental reason why the pension interest of the parties must, on the facts of this case, be an integral part of their joint estate. Central to the reasoning in my colleague's judgment is, in my view, the notion that a pension interest is neither immovable nor movable. And that because the clause under consideration provides that only immovables and movables shall be divided equally between the parties, anything else not expressly mentioned is excluded ... It therefore goes without saying that the parties' entitlement to each other's pension interests, which can be satisfied by a money payment, falls squarely within the rubric of movables. Seen in this

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[2] *Ndaba v Ndaba* [2016] ZASCA 162; 2017 (1) SA 342 (SCA).

[3] Ibid para 26.

light, the maxim *expressio unius est exclusio alterius* is therefore unavailing .. .'[4]

[12] The effect of *Ndaba* is that a pension interest of a member spouse as at date of divorce, by operation of law, forms part of the joint estate. It must be noted that the trial court certainly did not order a forfeiture of the mentioned benefit. In our view, the mere failure to include an order regarding the appellant's pension interest in the order of 19 January 2023 did not serve to negate the respondent's right to 50% of that benefit. The subsequent order against the fund was necessary only to authorize, inform, and instruct the pension administrator on how to comply with the court's existing duty.

[13] Transnet was cited as a party and did not object to the order. The appellant attempted to convince us that applying the principles set out in *Eskom Pension and Provident Fund v Krugel and Another*,[5] the appeal should succeed. In the aforementioned judgment, the Supreme Court held that '... once the pension benefit has accrued, ie beyond the date of divorce at which time the pension interest converts into a pension benefit, the provisions of s 7(7) and (8) are no longer applicable'. In *casu*, it is common cause that the appellant's employment had been terminated in 2019. However, from the evidence it would appear that Transnet has not paid over or released his pension benefit yet. In our view, the appellant probably would not have pursued this appeal had he received his full pension benefit. Therefore, we are not of the view that the magistrate was wrong in finding that the order of 19 January 2023 had to be supplemented as she did. On the contrary, we believe that the order of 8 December 2023 was (and is) necessary to properly effect the division of the joint estate. The appellant's entitlement to an amount equal to 50% of the value of the first respondent's pension benefit (held with the Government Employees Pension Fund), was ordered to be paid directly to the appellant in terms of the order.

[4] Ibid para 35.
[5] *Eskom Pension and Provident Fund v Krugel and Another* [2011] ZASCA 96; 2012 (6) SA 143 (SCA).

[14] In light of the aforementioned, it follows that we are not convinced that the trial court erred in any respect whatsoever. As such, the appeal cannot succeed. As there was no opposition to the appeal, there is no necessity for an order of costs.

[15] The following order is made:

The appeal is dismissed.

S CHESIWE
JUDGE OF THE HIGH COURT

I concur

C REINDERS
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances

For the appellant: Adv Madise

Instructed by: Moruri Attorneys Incorporated

For the respondent: No Appearance