IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

Not reportable
Case no: DIV240/12

In the matter between:

B[...] C[...] R[...] **APPLICANT**

and

M[...] S[...] R[...] **RESPONDENT**

Coram: Wessels AJ
Heard: 14 May 2026
Delivered: This judgment was handed down electronically, circulated to the parties' representatives via email, uploaded to CaseLines, and released to SAFLII. The date and time for the handing down of the judgment are deemed to be 16h00 on 1 July 2026.

Summary: Divorce - direction to pension fund - pension interest - applicant seeks variation of decree of divorce of Gura J to include entitlement to 50 per cent of respondent's GEPF pension interest - applicant fails to place original divorce papers before Court - omission in decree not established to be error of Gura J - In terms of *Ndaba v Ndaba* (2016) applicant's entitlement arises by operation of law under s 7(7)(a) of the Divorce Act 70 of 1979, not from any error by Gura J -direction to GEPF granted on basis of respondent's concession and operation of law - counter-application for appointment of liquidator and receiver also granted - applicant ordered to pay costs of both applications.

JUDGMENT

Wessels AJ

Introduction

[1] This is an opposed application in which the applicant seeks the variation of a decree of divorce granted by Gura Jon 15 July 2013 ('the divorce order') to include the applicant's entitlement to 50 per cent of the respondent's net pension interest in the Government Employees Pension Fund ('the GEPF'). The respondent opposes the main application but supports the variation of the divorce order, albeit on different grounds. The respondent brought a counter-application for the appointment of a liquidator and/or receiver to effect the division of the parties' joint estate.

Facts

[2] The parties were married in community of property on 13 April 1991 and divorced on 15 July 2013. Four children were born of the marriage, all of whom have attained the age of majority. The joint estate consists of immovable property, furniture and household contents, motor vehicles, cattle, and the pension interests of both parties in the GEPF. Apart from the immovable property and the respective pension funds of the parties, the status of the remaining communal assets is unclear from the papers. The divorce order ordered that the joint estate of the parties be divided. The decree of divorce further provided that the plaintiff (now the respondent before me) is entitled to 50 per cent of the defendant's (now the applicant before me) net pension interest in the GEPF, calculated as at the date of divorce, but importantly, it contains no provision entitling the applicant to a share of the respondent's pension interest. It is this omission that brought the parties before this Court.

[3] The applicant contends that Gura J erred in failing to include a provision entitling her to 50 per cent of the respondent's net pension interest as at the date of divorce, and that this omission has prevented her from accessing her half share from the GEPF. The respondent acknowledges that the applicant is indeed entitled to 50 per cent of his net pension interest calculated as at 15 July 2013. The respondent retired on 1 August 2025 and, as of the date of the hearing of the application, has not received his pension payout. The respondent, in his counter-application, requests that this Court declare that the applicant would be entitled to half of the respondent's pension interest in the GEPF and that a liquidator of the joint estate be appointed. The respondent alleges that the joint estate cannot remain undivided and that the appointment of a liquidator is necessary to effect an expeditious division.

Condonation

[4] The respondent's answering affidavit was filed out of time and the applicant's replying affidavit was filed approximately four months thereafter, also out of time. Both parties satisfactorily explained the reasons for the late filing of their respective affidavits. The matter proceeded to argument without objection from either side. It is in the interests of both parties and the proper administration of justice to deal with the matter on the merits. No party has indicated that the late filing of either affidavit has occasioned any serious prejudice. Condonation for the late filing of both the answering affidavit and the replying affidavit is accordingly granted.

Right to share in the pension interest

[5] Although both parties agree to the applicant's entitlement to half of the respondent's pension interest in the GEPF, their respective basis for requesting such orders differ significantly, which triggers an interrogation into the legal principles that support each application.

[6] The applicant seeks the variation of a final order. To assess whether there was any error in the divorce order, this Court should ordinarily have before it the papers that served before Gura J. However, none of these is before this Court, save for the divorce order itself. Counsel for the applicant acknowledged this *lacuna* and confirmed that the divorce was granted unopposed, and evidently without a settlement agreement being made an order of court. The divorce order records that only Adv D Smit appeared as counsel for the plaintiff and no one appeared for the defendant, who is now the applicant before me. The structure of the divorce order makes plain that what served before Gura J was an unopposed divorce action which evidently requested the plaintiff's entitlement to a half share of the defendant's pension, but not the converse. The applicant's allegation in this regard is important:

> 'I must state that the Defendant [sic] as **agreed between the parties erred in including that I am also entitled to 50% of his shares in the Pension fund** as we were married in community of property.' (emphasis added)

[7] At the unopposed hearing of the divorce, Gura J granted the relief that was requested in the plaintiff's summons. That cannot be a judicial error. At most, it reflects a failure by the plaintiff's attorney to include in the proposed order a provision for the mutual exchange of pension interests, but only assuming that a settlement between the parties had been reached. On the papers, no mention was made of a settlement agreement between the parties, and I must accept that there was none. The applicant has not established whether the applicant's entitlement to the respondent's pension fund had been agreed.

[8] Rule 42(1)(b) permits a court to rescind or vary an order in which there is an ambiguity or a patent error or omission, but only to the extent of that ambiguity, error or omission. The trite principle is that the ambiguity or patent omission must be attributable to the court itself and the order must not reflect the real intention of the judicial officer who pronounced it. Where, however, the order granted records what was prayed for, no error on the side of a court can exist. Beyond Rule 42(1)(b), the applicant implicitly

invokes the presence of a common mistake under Rule 42(1)(c) in the divorce order. A common mistake, however, requires both parties to have been before the court, labouring under the same erroneous assumption. In an unopposed divorce in which the defendant was absent and unrepresented, there is no basis on which to establish a mutual mistake communicated to the court. The applicant was simply not present before Gura J and neither was the divorce action presented to Gura J as settled.

[9] The founding affidavit to the main application devotes a single paragraph to the allegation that 'as agreed between the parties', the applicant's share in the respondent's pension fund should also have been included. That assertion, standing alone and unsupported by any corroborating evidence, does not establish the existence of a settlement agreement. Furthermore, the allegation that the issue of the applicant's entitlement to share in the respondent's pension interest in the GEPF had been denied by the respondent, to which denial the respondent did not reply. A court cannot vary a final order based on an inference drawn from a bare assertion. The applicant is required to place before the court the primary facts from which the necessary inferences can properly be drawn. As the Supreme Court of Appeal explained in *Willcox and Others v Commissioner for Inland Revenue*[1]:

> 'There is nothing artificial or technical about the notion of primary facts. Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.'

[10] The applicant, who bears the onus of proof in the main application, has not placed those primary facts before this Court and has not produced the summons, the particulars of claim, or the transcript of the record that served before Gura J. As a result, the applicant has not established that a claim to share in the respondent's pension was ever made in the divorce action, or whether any arrangement to that effect was

[1] *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 601 J - 602 A.

communicated to the plaintiff's legal representatives before the divorce order was granted.

[11] There is a further dimension, not advanced by any party in argument before this Court, that bears on the characterisation of the alleged error. The divorce order was granted on 15 July 2013. At that date, the legal position regarding whether a pension interest formed part of the joint estate by operation of law, or only upon a specific court order, was the subject of an unresolved conflict in our law. Section 7(7)(a) of the Divorce Act[2] ('the Divorce Act') provides that in determining the patrimonial benefits to which the parties may be entitled, the pension interest of a party shall be deemed to be part of his assets. But whether this deeming provision operated automatically or required a specific claim and court order had not been settled at that time. Two irreconcilable schools of thought existed. Following *Sempapalele v Sempapalele*[3], many courts held that a non-member spouse had to seek and obtain a specific court order at the time of the divorce and silence in the decree of divorce was treated as a forfeiture of the claim. Conversely, *Maharaj v Maharaj*[4] held that s 7(7)(a) of the Divorce Act operated by force of law and no specific order was required. This Division itself, in *Kgopane v Kgopane*[5], followed the stricter *Sempapalele* approach, holding that a non-member spouse was entitled to a share of the pension interest only if a specific order was granted at the date of the divorce, and that a liquidator had no power to divide that interest later if the summons had not claimed it and the final decree was silent. The Supreme Court of Appeal ('SCA') decisions, at the time, in *Old Mutual v Swemmer*[6] and *Eskom Pension and Provident Fund v Krugel and Another*[7], while authoritative on other aspects of the issue of the entitlement to a share in a spouse's interest in a pension fund, did not resolve this uncertainty. This confusion was only settled by the SCA in *Ndaba v Ndaba*[8] in November 2016, three years after the decree of divorce in this matter was granted.

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[2] Divorce Act 70 of 1979.
[3] *Sempapalele v Sempapalele* 2001 (2) SA 306 (O).
[4] *Maharaj v Maharaj* 2002 (2) SA 648 (D).
[5] *Kgopane v Kgopane* (1819/2011) [2012] ZANWHC 58 (16 August 2012).
[6] *Old Mutual v Swemmer* 2004 (5) SA 373 (SCA).
[7] *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA).
[8] *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162.

[12] Because of *Ndaba*, it is the respondent who should succeed because s 7(7)(a) of the Divorce Act automatically gives the applicant a share in the joint estate at the time of divorce. The SCA in *Ndaba* decided that decisions requiring a specific order, such as *Sempapalele* and, by extension, *Kgopane*, were wrong. So, the applicant's right to share in the respondent's pension interest is not dependent on the amendment of the divorce order but on her right to share as found ins 7(7)(a) of the Divorce Act. What is needed is not to change the divorce order, but to instruct the GEPF to recognise an entitlement that has existed since the divorce. The respondent expressly relies on that entitlement in his counter-application. Accordingly, in contrast to the inadequacy of the main application's Rule 42 relief, the counter-application provides the proper legal and factual foundation for the order sought. To that extent, the counter-application should be granted, with the main application dismissed.

Appointment of a liquidator

[13] The respondent's counter-application seeks the appointment of a liquidator and/or receiver of the parties' joint estate. The basis for such an appointment is well-founded on the papers. Where parties married in community of property have been divorced but are unable to agree on the division of the joint estate, a court may appoint a person to administer and effect the division on its behalf. The trite requirements are that the joint assets must be of a nature that justifies the appointment of a liquidator and the parties must be unable to agree on a division.

[14] Both requirements are met. The joint estate consists of immovable property, motor vehicles, cattle, and the pension interests of both parties. These assets require valuation and formal distribution. The parties have been unable to agree on a division since 15 July 2013, a period now exceeding 12 years.

[15] The applicant's counsel, initially opposing the counter-application, submitted that the appointment of a liquidator should be postponed pending resolution of the pension issue, suggesting that once the applicant received her pension share, she might be able

to buy the respondent's interest in the immovable property. That submission, while intended to be pragmatic, is not a sufficient reason to dismiss the appointment of a liquidator. It is speculative as it places the burden of the entire estate on one asset, and it disregards the respondent's right to a lawful and long-overdue division. The counter-application is well-founded and stands to be granted.

[16] The intended liquidator, Mr Phillip Jordaan of Divorce Settlement Services Pretoria, has consented to his appointment as liquidator and/or receiver, subject to the powers as suggested in the counter-application.

Costs

[17] The successful party is, as a general rule, entitled to an order for costs, and the court should not depart from that rule without good reason. The award of costs is, however, a matter within the court's discretion, taking into account the circumstances of each case, the conduct of the parties, and what is fair and just between them.

[18] This matter calls for careful reflection on the question of costs. The applicant launched the main application on the wrong basis. As a result, the basis for the main application could not be sustained. The deficiencies in the main application were only cured by the counter-application, which provided the proper legal basis for a just outcome. The relief ultimately granted resulted from the counter-application.

[19] Furthermore, the applicant initially opposed the counter-application and sought to have the appointment of a liquidator postponed indefinitely, which opposition was unjustified. Applicant's counsel submitted in closing that each party should pay their own costs, citing the respondent's retirement and the financial circumstances of both parties. However, a party's financial circumstances, while a relevant consideration, do not override the principle that costs follow the event, particularly where the conduct of the party seeking indulgence has contributed to the unnecessary escalation of costs. I am satisfied that a costs order against the applicant is fair and warranted by the conduct of

the applicant in these proceedings. As the appointment of a liquidator provides a structure for the liquidation of the estate, it is practical to allow the cost order to be paid from the proceeds of the liquidation of the joint estate, with the liquidator to make a consequential adjustment to the final distribution of the assets. The matter was, however, not complex and does not warrant a cost order on a higher-than-normal scale, to the extent that costs on Scale A are appropriate.

Order

[20] For these reasons, I make the following order:

1. The main application is dismissed.

2. It is declared that the applicant, B[...] C[...] R[...], is entitled to one half of the respondent's net pension interest in the *Government Employees Pension Fund*, calculated as at the date of divorce, being 15 July 2013, payable in terms of s 3 of the Government Employees Pension Law Amendment Act 19 of 2011.

3. The Government Employees Pension Fund is hereby authorised and directed to give effect to the order in paragraph 2 above.

4. Mr Phillip Jordaan of Divorce Settlement Services, Pretoria ('the Liquidator'), is appointed as receiver and/or curator and/or liquidator of the joint estate of the parties with the following powers and duties as set out in paragraphs 5 to 8 hereof.

5. The Liquidator shall take control over the joint estate and shall enjoy all the powers of an administrator hereof. Without derogating from the generality of the foregoing, the liquidator shall also be entitled:

5.1. to accumulate details of all the assets, movable or immovable assets, tangible or intangible, which form part of the joint estate;

5.2. to accumulate details of all liabilities of the joint estate;

5.3. to make all investigations necessary and, in particular, to obtain from the parties all information about the assets and liabilities of the joint estate;

5.4. to obtain information and copies regarding the financial affairs of the parties, including bank accounts, bank statements and but not limited to any information or interest relating to or interest in any long-term insurance policy, collective investment scheme, endowment policies, annuity policies and retirement annuity policies or any other financial products or services, from bank managers and/or managers of any long-term insurance, unit trust manager or any other financial institution, which includes all insurance companies and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum Professional Provident Fund (PPS) about the assets and liabilities of the joint estate;

5.5. to obtain information and/or balance sheets and copies from the auditors or any other person but not limited to any information or interest relating to or interest in any long-term insurance policy, collective investment scheme, endowment policies, annuity policies and retirement annuity policies or any other financial products or services, from bank managers and/or managers of any long-term insurance, unit trust manager or any other financial institution, which includes all insurance companies and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum, Professional Provident Fund (PPS), who may have knowledge of the financial affairs of any companies, close corporations, trusts or businesses in which the applicant, the respondent and/or the joint estate of the parties may have an interest;

5.6. to obtain information and copies of the financial statements of any companies, close corporations, trusts or businesses in which the applicant, the respondent and/or the joint estate of the parties may have an interest;

5.7. to inspect the books of account of any companies, close corporations, trusts or businesses in which the applicant, the respondent and/or the joint estate of the parties may have an interest;

5.8. to physically inspect the assets of the joint estate and to compile a full inventory of all the assets referred to in paragraph 5.1 above;

5.9. to obtain sworn valuations of the assets referred to in paragraph 5.1 above, the costs of which will be for the account of the joint estate;

5.10. to interrogate or interview the applicant and the respondent and any other person in order to give effect to paragraphs 5.1 and 5.2 above;

5.11. to subpoena the applicant, the respondent and witnesses out of the appropriate forum for purposes of interviewing and/or interrogating such persons at a date, place and time to be determined by the Liquidator and to ensure that the proceedings in terms hereof are recorded in order to give effect to paragraphs 5.1 and 5.2 above;

5.12. to inspect all books, vouchers, cheques, deposit slips, bank statements and, in general, all documents in possession of any person for the purposes of giving effect to paragraphs 5.1 and 5.2 above;

5.13. to make and retain copies, at his discretion, of all the documents and books referred to in paragraph 5.12 above;

5.14. to submit, after completion of his duties referred to in paragraphs 5.1 to 5.13 above, a full report of his investigations to both the applicant and the respondent;

5.15. to distribute the net assets of the joint estate in accordance with paragraphs 6 and 7 hereunder between the applicant and the respondent on such basis as may be agreed upon between them, alternatively if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty (the applicant and the respondent having a right also to bid) and thereupon to divide the net proceeds between the applicant and the respondent in accordance with paragraphs 2 and 3 hereunder;

5.16. to engage the services of any suitable qualified person or persons to assist him in determining the proper value or whereabouts of any of the assets of the joint estate and to pay such person or persons the reasonable fees which may be charged by him;

5.17. to afford both the applicant and the respondent personally the opportunity to make recommendations to him about any matter relevant to his duties and to this order and to the identity of any purchaser as well as the purchase price of any asset, including but not necessarily limited to:

5.17.1. the time and/or manner in which any assets shall be realised;

5.17.2. the price at which any assets should be realised; and

5.17.3. the sequence in which any assets should be realised;

5.18. to give due consideration to the wishes of the parties pursuant to the representations made by them and make such decisions in respect thereof as he may deem fit;

5.19. to sell any assets to either the applicant or the respondent for a price that he deems to be the true market price of such assets;

5.20. to sign any documents as may be necessary to effect the transfer of any assets sold from the person in whose name they are registered to the purchaser thereof;

5.21. not to realise any movable assets excluding shares, unit trusts and insurance policies without giving both the applicant and the respondent ten days' notice of his intention to do so;

5.22. to give both parties a first right to purchase any such assets as envisaged in paragraph 5.21, in the case of sale by treaty at the same price he is able to obtain from a bona fide third party, or in the case of a public auction, at a better price than that offered by a bona fide third party;

5.23. to apply to the appropriate forum for any further directions as he shall or may consider necessary;

5.24. to institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever Court it shall be appropriate to bring such proceedings;

5.25. to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the purposes of obtaining delivery of any assets alleged to be vested in the joint estate and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the joint estate in accordance with the principles enounced in Muller v The Master and Others, 1992 (4) SA 277 (T).

5.26. to collect debts due to the joint estate unless the same be disposed of by sale;

5.27. to defend any action launched against the joint estate;

5.28. to pay the liabilities of the joint estate;

5.29. to pay his reasonable fees and to apportion such fees between the parties in the same proportion as they are entitled to the assets of the joint estate;

5.30. to direct in terms of Section 7 (8) of the Divorce Act 70 of 1979 that a portion not exceeding 50% of a party's pension interest as at the date of divorce be paid to the other party as and when the pension benefits accrue to the party entitled to these and to require the pension fund concerned to endorse its records accordingly;

5.31. to obtain full particulars of all the applicant's and the respondent's insurance policies from all insurance companies which includes and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum, Professional Provident Fund (PPS) including but not limited to life policies, endowment policies, annuity policies and retirement annuity policies from the underwriters thereof, alternatively from such underwriters' duly authorised agents and to deal with such policies in his discretion in order to enable the liquidator to give effect to the provisions of paragraphs 6 and 7 below;

5.32. to instruct banks and/or financial institutions to deal with investment and bank accounts as the Liquidator may, in his discretion, deem necessary in order to protect the rights of one of the parties or both parties in order to give effect to the provisions of paragraphs 6 and 7 below;

5.33. to allocate, in his discretion, both assets and liabilities between the parties.

6. The division of the net assets referred to in paragraph 5.15 above shall be subject to the protection of the rights and claims of secured and preferent creditors of the joint estate.

7. The division of the net assets referred to in paragraph 5.15 above shall be in equal proportions between the applicant and the respondent.

8. The Liquidator is not required to find security for his administration.

9. The late filing of the respondent's answering affidavit and the applicant's replying affidavits is condoned.

10. .The applicant is ordered to pay the respondent's costs of the main application and of the counter-application on the party-and-party scale A, which costs are to be paid from the applicant's share of the joint estate after liquidation of the joint estate of the parties.

M WESSELS

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

For the applicant:	Mr T Tlhasi
Instructed by:	Tlhasi Inc,Mahikeng
	c/o Motshabi & Associates, Mahikeng
For the respondent:	Ms Z Marx
Instructed by:	Shapiro & Ledwaba Inc, Pretoria
	c/o Nienaber & Wissing Attorneys, Mahikeng