



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: **18982/2011**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 21 AUGUST 2026

SIGNATURE

In the matter between:

H[...] F[...] S[...]

Plaintiff

and

C[...] Z[...] S[...]

Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such 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 handing down is deemed to be 21 August 2026.

Summary: Marriage in community of property- divorce - divorce proceedings in terms of section 7(7) and 7(8) of the Divorce Act 70 of 1979- pension interest converted into a pension benefit – half of the pension benefit preserved by court order not constituting a deduction envisaged in terms of section 37D(1)((a)(i) of the Pension Act 24 of 1956.

JUDGMENT

RETIEF J

INTRODUCTION

[1] This is a defended divorce action involving parties who are married to each other in community of property. They entered into their marriage on the 19 August 1992. However, since the 2 April 2008 they have lived separate and independent lives. They now, almost after 2(two) decades, seek to formally dissolve their marital bonds, by decree. The only remaining issue for determination, by agreement, was the forfeiture claim raised by the plaintiff concerning the defendant's entitlement to a share of the plaintiff's pension benefit by virtue of their marital regime.

[2] At the time of the institution of the divorce action in 2011 and, for that matter, when the last effected amendment to the pleadings occurred, the plaintiff was factually still an active member of the Government Employees Pension Fund [GEPF]. Therefore, at that time, there was a 'pension interest',¹ as envisaged in terms of section 1 of the Divorce Act 70 of 1979 [the Divorce Act] for purposes of

¹ Pension interest is defined as:

"1. "pension interest" in relation to a party to a divorce action who –

(a) *Is a member of a pension fund (own emphasis) (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 terminated on the date of the divorce (own emphasis) on account of his resignation from his office;"*

sections 7(7) and 7(8) of the Divorce Act to speak of. However, flowing from the undisputed fact that the plaintiff, before the date of divorce, retired from his employment and therefore no longer contributed to the fund, his 'pension interest' was converted into a pension benefit. In consequence, the plaintiff no longer held a pension interest in GEPF at the date of his retirement.² This jurisdictional fact persists even if the plaintiff requested the benefit to be deferred to another fund or, as will become clearer, even if it was preserved by order³. The benefit became a patrimonial benefit which formed part of the joint estate. No further amendments were effected on the pleadings incorporation this fact. Therefore, an order premised on the provisions of section 7(7) and 7(8) of the Divorce Act is not competent.

[3] Both Counsel were made aware of this position and were requested to supply further heads of argument.

[4] Without, at this introductory stage, expressing the difficulty this Court had with the further contentions advanced by both Counsel, it is convenient at this stage to consider an existing relevant Court order regarding the plaintiff's pension.

24 MARCH 2024 ORDER REGARDING THE PLAINTIFF'S PENSION

[5] The defendant before by Mooki J on the 24 March 2024 sought the following material relief:

"1. The second respondent (the GEPF – own emphasis) be and is hereby ordered to effect the payout (own emphasis) of only one half of the pension benefit due (own emphasis) to the first respondent (plaintiff – own emphasis) and that the other half be withheld pending finalisation of the divorce action between the applicant (defendant – own emphasis) and the first respondent."

² **Old Mutual Life Assurance Co (SA) Ltd & Others v Swemmer** 2004 (5) SA373 (SCA) at par 18 and **Eskom Pension and Provident Fund v Krugel & Another** [2011] (4) SCA; 2012 (6) SA 142 (SCA) at para [11] [Eskom matter].

³ Ibid Eskom matter para [13]-[14].

["preservation order"]

[6] The wording of the preservation order was not in dispute. Prayer 1 gave direction to the GEPF regarding the plaintiff's accrued pension benefit. It directed GEPF on when, to whom and how the plaintiff's pension benefit should be dealt with when it paid out. The date upon which the pension benefit could effectively be paid out, was triggered by the plaintiff's retirement in June 2024. Only then, by order, could the plaintiff receive one half of his accrued benefit. The balance was to be held by the GEPF until the divorce action was finalised. The defendant, in all likelihood, obtained this order to prevent the plaintiff from dissipating the pension benefit which automatically formed part of the joint estate as, on the facts, she had no control over the funds. The defendant was well aware of this potential consequence as she herself testified to, without the plaintiff's knowledge, spending the pension benefits which accrued to her.

[7] The preservation order did not cater for the provisions of section 7(7) and 7(8) of the Divorce Act nor did the facts.⁴ The balance of the pension benefit held by the fund, by order, could therefore not have been preserved as a deduction for a non-member spouse as envisaged by section 37D(1)(a)(i) of the Pension Fund Act 24 of 1956, as amended.⁵ The one half benefit was preserved by instructing the GEPF to withhold the accrued payment thereof. Such payment, in terms of the fund, only accrued to the plaintiff as its member, when it became due.

[8] Notwithstanding, both Counsel argued and maintained that the division of the joint estate had already occurred and was not in issue and that only the forfeiture claim remained. To unpack this, having regard to what has been found, calls for a consideration of relevant background facts is required.

RELEVANT BACKGROUND FACTS

⁴ N[.] v N[.] (600/2015) [2016] ZASCA 162 (4 November 2016).

⁵ See foot note 2, Eskom matter para [8].

[9] The plaintiff and the defendant were married to each other, in community of property on 19 August 1992. The parties separated on the 2 April 2008 and although the marriage, in law subsists, it is common cause that proceedings that the plaintiff and the defendant "*carried on their lives with absolute independence from each other and each other managed their own affairs*."

[10] The parties had two children together. Sibongile Siyali, was born prior to their marriage on 4 September 1990 and Joshua Chuma Siyali, was born during the marriage on 8 September 1993. It is common cause that both the children have attained majority.

[11] It is common cause that the plaintiff fathered other children before his marriage to the defendant and, that he fathered one as a result of an extra marital affair whilst he was married to the defendant.

[12] It is common cause that the marriage has broken down irretrievably and that both parties desire a decree of divorce.

[13] The parties maintain that the division of their joint movable and immovable assets has already occurred.

[14] The defendant has already received two pension benefits during the subsistence of the marriage. The first payout was received on the 31 March 2011 in the amount of R85 064.00 and the second payout received on the 20 June 2024 was in the amount of R450 520.00. These payments were made without the knowledge of the plaintiff and spent by the defendant.

FORFEITURE CLAIM

[15] Arising from the pleadings, the only pleaded case raised by the plaintiff⁶ in support of the partial forfeiture of the benefit was, as submitted by his Counsel, in paragraph 8.5 of his amended particulars of claim that "*As from the 3rd of April*

⁶ **Koza v Koza** 1982 (3) SA 462 (T) at 465.

2008 the defendant did not contribute towards the growth of the plaintiff's pension benefits in any way."

[16] The lack of the defendant's contribution towards the growth of the pension from the time of their separation is pleaded as constituting an undue benefit if half of such benefit was to be awarded to the defendant. To achieve what constituted a benefit which was not undue and therefore owing to the defendant, the plaintiff sought to 'cap' the defendant's claim. This gives rise to a partial forfeiture claim in terms of section 9 of the Divorce Act. To achieve 'the cap', the plaintiff sought this Court to direct the GEPF to pay the defendant a half share of his pension interest calculated from date of marriage to date of separation. Therefore, the amount to be calculated and awarded was to exclude the period of separation. The plaintiff's prayers accepted that the provisions of sections 7(7) and 7(8) of the Divorce Act were applicable to give effect thereto.

[17] The plaintiff not only bears the onus to prove the nature but the ambit and extent to which such benefit is undue.⁷ The plaintiff failed to discharge his onus. The plaintiff nor his legal team appreciated that the nature of the benefit, although made up of the plaintiff's pension, it no longer was an interest deemed part of the joint estate at divorce but that it had already accrued in 2024 forming part of joint estate.

[18] On the facts one half in the form of a cash payment and the other an accrued value, merely withheld.

[19] No evidence was lead regarding the ambit nor extent of the accrued pension benefit the plaintiff was entitled to when it became due. Let alone, but for the preservation order, what was done with it, whether reinvested in whole or in part or simply spent on day-to-day expenses. This Court was left totally in the dark. No documentary evidence was tendered. It was therefore impossible to determine whether any part thereof as pleaded was undue. The forfeiture claim must fail. In such circumstances the need for this Court to consider the section 9

⁷ **Engelbrecht v Engelbrecht** 1989 (1) SA 597 (C).

justification factors is not triggered. Logically, if no actual benefit is proved how then is one to determine whether it was undue? None then can be found.

[20] Even if this Court was to engage with the non-cumulative justification considerations⁸ provided for in section 9(1) of the Divorce Act, the forfeiture claim must still fail as the plaintiff failed to deal with any facts to assist this Court exercise its wide discretion in favour of justification. This failure was clear on the pleadings and clear by its absence in his testimony.

[21] In short and for illustration, even if regard is to be had to the evidence as a whole, the forfeiture claim is not justified. According to the evidence, although the parties had been married for 34(thirty-four) years of which 18(eighteen) years thereof had been spent living independent lives, the marriage legally subsist till a decree of divorce is granted, therefore, this marriage was anything but one of a short duration. Furthermore, the pleaded reasons for the breakdown of the marriage at the trial became irrelevant, the potency appeared forgotten and, what remained was the plaintiff's inability to testify to any identifiable reason let alone any, as pleaded by him. He however, persisted that the reason for the breakdown of the marriage was not as a result of his 3(three) children which were not born of his marriage with the defendant one of whom was conceived whilst he was married to the defendant.

[22] Of significance too, was the fact that the defendant also failed to rely on the pleaded reasons for the irretrievable breakdown relied by her counter claim. She however appeared to accept the plaintiff's children which she knew of or came to know of in principle and even testified to accommodating certain of them under their roof. The difficulty with this Court identifying the plaintiff's children by name in this judgment has been hampered by a disconnect on the record between the plaintiff's and defendant's own evidence, This too was exacerbated by the defendant's Counsels written heads of argument which failed to remedy the disconnect. Be that as it may, of relevance is that the plaintiff wanted that the

⁸ **Wijker v Wijker** 1993 4 SA 720 (A).

defendant to accommodate all his children under one roof. This was a stretch too far for the defendant and the plaintiff then left the common home. This was the reason for the irretrievable breakdown testified to by the defendant. Irretrievable breakdown in principle is a common cause fact and the parties have been separated for more than a decade.

[23] No reasons testified to constituting the irretrievable breakdown of the marriage justify the forfeiture claim.

[24] Furthermore, no substantial misconduct by the defendant was pleaded nor was any demonstrated and argued by the plaintiff's counsel emanating from the evidence. The only 'misconduct' argued was that the defendant withdrew her pension benefits without the plaintiff's knowledge and used it for her own benefit. This was argued notwithstanding the admitted facts that the first pension benefit was to pay a deposit of an Audi motor vehicle which vehicle was both used by both parties and, as to the remaining benefit payout, the defendant testified that she used it to start a business, pay debts including a loan and to maintenance both their children. It furthermore was common cause that the defendant had to obtain a maintenance order of R 500 per month to ensure that she received regular maintenance from the plaintiff for the children they had together after their separation. No substantial misconduct of the defendant can be found.

[25] No substantial misconduct by the plaintiff was pleaded for this Court to consider. For all these reasons, the forfeiture claim must fail as pleaded. Therefore, the ineffective prayers sought by the plaintiff become of no moment for want of granting them.

[26] But what of the division of the remaining asset forming part of the joint estate now that the forfeiture claim fails?

DIVISION OF THE JOINT ESTATE

[27] The pension benefit, albeit that which is capable of division as at date of divorce, remains to be dealt with. The plaintiff conceded to the defendant's

entitlement thereto but, for that which was undue. Now that the forfeiture claim failed, the remaining asset by the operation of law can be divided.

[28] The value of the remaining asset, which amount also includes the value of the one half held by the GEPF by order, forms part of the joint estate.

[29] As reasoned applicability of the provisions of section 7(8) and 7(9) of the Divorce Act do not arise. Therefore, the defendant's counterclaim which speaks to section 7 of the Divorce Act is ineffective.

[30] No evidence was led to assist this Court to determine what remained of the portion paid in cash to the plaintiff. Therefore, the value of the claim held by the GEPF by virtue of the preservation order is the only remaining asset capable of division and nothing prevents the GEPF, if ordered to pay each party one half of the value held by them, to do so.⁹

[31] As to the costs, both parties failed to address the disconnect between the evidence and what was pleaded. Both the relief sought in the main action and counter claim were rendered ineffective and, this Court and the plaintiff were only informed by the defendant at trial of its mootness. Furthermore, notwithstanding the only issue for determination, the assets of the joint estate as they pertained to the pension had to be divided. Both Counsel were unhelpful in this regard. In exercising this Court's discretion, the parties are to bear their own costs.

The following order:

1. A decree of divorce is granted.
2. The Plaintiff's forfeiture claim is dismissed.

⁹ See footnote 4.

3. The Government Employees Pension Fund is directed to divide the amount held by virtue of the Court order date 24 March 2024 by Mooki J and directed to pay both the Plaintiff and Defendant an equal share thereof.
4. Each party bears their own legal costs.

L.A. RETIEF

Judge of the High Court
Gauteng Division

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