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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:A3058/2015

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

.....
SIGNATURE

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DATE

In the matter between:

[P.....] [J.....] [K.....]

Appellant

and

GOVERNMENT EMPLOYEES PENSION FUND

1st Respondent

[M.....] [E.....] [K.....]

2nd Respondent

J U D G M E N T

MASHILE J:

- [1] This appeal emanates from the court *a quo*, the Regional Divorce Court for the Regional Division of Gauteng Held at Johannesburg. It is directed against Magistrate Chatrim's refusal to grant an order entitling the Applicant to 50% of the Second Respondent's pension interest administered by the First Respondent.
- [2] The Appellant's and the Second Respondent's marriage in community of property legally ended on 24 August 2010, on which date the court *a quo* granted a final decree of divorce. The court *a quo* decreed, among other things, that the joint estate of the parties shall be divided between them but did not make a specific order that 50% (or any other portion) of the Second Respondent's pension interest shall be paid by the First Respondent to the Second Respondent when the pension benefit accrues to the Second Respondent and for an endorsement to that effect in the First Respondent's records.

- [3] While there is an order that the joint estate be divided, to date the parties have neither concluded an agreement for the division nor have they appointed a receiver and liquidator to assist them with the division. The Appellant avers that her intention had always been, when seeking a decree of divorce, to apply for the endorsement in the First Respondent's records that 50% of the Second Respondent's pension interest be paid to her when the pension benefits accrues to the Second Respondent.
- [4] Shortly before the finalization of the divorce, however, the Appellant went into a depression for which she received treatment. The Appellant recovered from the depression well after the court *a quo* had granted the divorce decree. She is now desirous of finalizing the division of the estate. Since the divorce decree does not include an order directing the First Respondent to pay to the Appellant 50% of the Second Respondent's pension interest, as at the date of divorce, when the pension benefits accrue to the Second Respondent and to endorse its records to this effect, she deemed it necessary to approach the Court *a quo* for a declaratory order in those terms.
- [5] It is the declaratory order that the court *a quo* declined to entertain on the basis that the Appellant had furnished no reasons for it. Like the proceedings in the court *a quo*, the appeal was not opposed and there

was no appearance on behalf of the Respondents when the matter was argued. The Appellant is appealing the refusal of the application on the ground that the court *a quo* erred by refusing to entertain her application merely because she had failed to furnish reasons why she did not apply for an order that 50% of the Second Respondent's pension interest at the date of divorce should be paid to her when the pension benefits accrue to the Second Respondent and for such endorsement in the First Respondent's records at the time of the divorce trial.

[6] Against that background, this Court has to determine whether or not:

6.1 The Second Respondent's pension interest formed part of the joint estate of the parties at the time of their divorce; and

6.2 it is still competent for the Appellant to apply for an endorsement in the records of the First Respondent that 50% of the Second Respondent's pension interest at the date of divorce is paid to the Appellant when the pension interest accrues to the Second Respondent where a court has already granted a divorce decree dissolving a marriage in community of property without an accompanying order directing such an endorsement in the First Respondent's records.

[7] The Appellant contended that for her to succeed, she needs only establish the following:

7.1 She was married to the Second Respondent in community of property;

7.2 The marriage was terminated by an order of court on 24 August 2010;

7.3 There is no direction in the divorce decree that the records of the First Respondent must be endorsed so that the Appellant's 50% share of the Second Respondent's pension interest at the date of divorce can be calculated;

7.4 Although a court has ordered a division of the joint estate, the parties have not yet embarked on that process.

[8] The legal position concerning this issue is contained in Section 7(7) and (8) of the Divorce Act No. 70 of 1979, which provides:

"(a) In the determination of 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) *Notwithstanding the provisions of any other law or 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 the member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by the fund to that other party when any pension benefits accrue in respect of the 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 the other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within 1 month of receipt of such notification;*

(b) *Any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned."*

[9] In the case of **Sempapalele v Sempapalele 2001(2) SA 313 (O)** Musi J took the view that Section 7(7) requires a party seeking the endorsement in the records of a pension fund that the pension interest is payable to him/her has to apply for an order in terms of Section 7(8) at the hearing of the divorce. The upshot of lack of compliance with the section would lead to a court denying the applicant an opportunity to do so at any other time post the divorce, it being irrelevant that there had not been a division of the joint estate.

[10] Magid J, in **Maharaj v Maharaj and Others 2002 (2) SA 648 (D)** differed with Musi J's approach. He expressed his disagreement with Musi J's view in the following terms:

"..... But, if the learned Judge intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half-share thereof, I am, with respect, unable to agree with that view."

[11] Although Goosen J in **Fritz v Funds at work Umbrella Pension Fund and Others (2323/2011) [2012] ZAECPEHC 57; 2013 (4) SA 492 (ECP)** agreed with Magid J, he eventually dismissed the case of the applicant as it was clear that the parties had concluded an agreement by which they divided the joint estate. It appears from the above that except for the **Sempapalele** case *supra* that adopts the approach that a decree of divorce must include an order in terms of Section 7(8), the majority of the courts that have expressed an opinion on the subject hold the view that provided the joint estate has not been divided, a party can still obtain relief in the terms claimed by the Appellant in this matter.

[12] All the cases to which I have referred above express the view that the introduction of Section 7 of the Divorce Act No. 70 of 1979 was to address the rather iniquitous exclusion of a pension interest from the one spouse in a marriage in community of property by including a spouse's pension interest in the joint estate. While the **Sempapalele** case *supra* adopts this approach as well, the only qualification is that it does not appreciate that as a fact that unfolds axiomatically from the provision of the section; rather it envisages that a party must apply for the inclusion thereof.

[13] This court, like the **Maharaj** and the **Fritz** cases *supra*, is of the opinion that Section 7 is designed to depart from the situation that prevailed prior to the introduction of Section 7. Accordingly, no need existed for the Appellant to have made an application for the inclusion of the Second Respondent's pension interest into the joint estate.

[14] Again, on the question whether or not the Applicant could apply for the endorsement of the Second Respondent's pension interest well after the date of divorce, this Court's approach must be in line with the **Maharaj** and the **Fritz** cases *supra* for the simple reason that permitting the Appellant to do so neither inconveniences nor prejudices the Respondents because division has not happened yet. Moreover, lack of opposition by either Respondent strengthens the granting of an order in the terms prayed for by the Applicant.

[15] In the result, the appeal succeeds and I make the following order:

1. The order of the court a quo is set aside and is substituted for:

"1.1 The Applicant (Appellant) is entitled to 50% of the pension interest of the Second Respondent, administered by the Government Employees' Pension Fund up to the date of divorce;

1.2 50% of the Second Respondent's pension interest which is due to the Appellant shall be paid by the Government Employees' Pension Fund to the Appellant when the pension benefits accrue to the First Respondent and an endorsement to this effect shall be made in the First Respondent's records;

1.3 Condonation for the late filing of the application is granted;

1.4 No order as to costs."

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree,

S K HASSIM
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

Counsel for the Applicant:	MrMthenjwa David Hlatshwayo
Instructed by:	HLATSWAYO-MHAYISE INC
Attorneys for 2 nd Respondent:	No appearance
Instructed by:	SHARUSHA MOODLEY ATTORNEYS
Date of hearing:	02 February 2016
Date of Judgment:	30 March 2016