

SOUTH AFRICA / JUDGMENT

A.C.K v F.K (A143/2021) [2022]

ZAFSHC 179 (28 July 2022)

[2022] ZAFSHC 179

COURT

Free State High Court, Bloemfontein

BEFORE

Loubser, Daniso, Litheko

CASE / FILE NUMBER

A143/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: A143/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

A[...]

C[...]
K[...]

Appellant

and

F[...]

K[...]

Respondent

CORAM: LOUBSER,
J et DANISO, J et LITHEKO, AJ
HEARD
ON: 13
JUNE 2022

JUDGMENT

BY: LOUBSER, J

DELIVERED ON: 28 JULY 2022

- [1] This is an appeal against the judgement of a single Judge sitting in this Division. The judgement appealed against, followed in the wake of another judgement by Murray, AJ a few years earlier in the divorce action between the parties. The judgement now under appeal, concerned a correct interpretation of the judgement delivered by Murray, AJ.

The Appellant was granted leave to appeal against the later judgement since it appeared to the Court hearing the leave application that the earlier judgement was not correctly interpreted in the later judgement as far as a singular crucial question was concerned.

- [2] That single question forms the subject-matter in the present appeal. The question is whether half of the Respondent's pension fund, which was awarded to the Appellant in the divorce action, ought to be considered as an asset of the Appellant in the computation of the accrual of the estates of the respective parties. In this respect the

judgement

of Murray, AJ in the divorce action becomes relevant because that judgement was not taken on appeal by any of the parties and because the judgement became the focus point of the later proceedings that are now under appeal.

- [3] The background facts are the following: In a comprehensive judgement handed down in July 2015, Murray, AJ made a number of orders, of which I quote only those that are relevant to the present enquiry. The judgement was in Afrikaans, and the orders so quoted are based on a loose translation thereof. The relevant orders are the following:

"1. A decree of divorce is granted.

6. The Defendant (present Respondent) is ordered to pay to the Plaintiff maintenance in the amount of R7 500.00 per month for a period of 5 years from the date of divorce, the first payment to be made before or on 1 August 2015, and thereafter before or on the first day of every subsequent month.

8. The Plaintiff is entitled to share in the accrual in accordance with the provisions of the Matrimonial Property Act 88 of 1984, the amount calculated as on date of divorce to be agreed between the parties within 14 days after date of divorce, failing which the parties are granted leave to approach this Court for the appointment of a receiver with the necessary rights and competency to determine the accrual.
9. The Plaintiff is entitled to 50% of the Defendant's pension interest in the Eskom Pension and Provident Fund as on date of divorce. The Defendant is ordered to inform the Eskom Pension and Provident Fund accordingly and to request it to make such an entry in their records."
- [4] Some five years later the abovementioned Defendant, Mr. K[...], issued summons against Mrs. K[...] to recoup monies allegedly accruing to him pursuant to the dissolution of their marriage. It transpired that Mrs. K[...], the Defendant in that action, had received an amount of R1 944 036.36 as the 50% pension interest of Mr. K[...] as per the Court Order of Murray, AJ. Mr. K[...] contended in that action that this payment formed an asset transferred to the estate of the Defendant and that it had to be taken into consideration when calculating the accrual, which was the only outstanding issue post-divorce. The Defendant, on the other hand, contended that the payment so received was meant to be maintenance for herself, because she had asked for lifelong maintenance in the divorce action, but the Court awarded her only maintenance of R7 500.00 per month for 5 years.
- [5] The learned Acting Judge hearing this action instituted by Mr. K[...] interpreted the judgment handed down by Murray, AJ, and came to the conclusion that in the judgment, the anticipated amount (the 50% of the pension interest) was meant to be utilized by the Defendant as an asset that was transferred to her estate and "stand to be utilized in the mathematical calculation of the accrual". The learned Acting Judge then ordered the Defendant to pay the amount of R 417 000.00 plus interest to Mrs. K[...] as a consequence. The present appeal lies against this finding of the learned Acting Judge.
- [6] Consequently, this Court of Appeal has to interpret the judgment of Murray, AJ to establish whether the second judgment incorrectly interpreted same. Again, a loose translation of certain passages in the judgment of Murray, AJ will be used in this process.
- [7] The first indication of what Murray, AJ meant, is to be found in the orders she made. Paragraph 8 of the order reads that "the Plaintiff is entitled to share in the accrual in accordance with the provisions of the Matrimonial Property Act 88 of 1984, the amount calculated as on date of divorce..." This part of the order corresponds with Section 3(1) and (2), read with Section 4(1) of the said Act, which provides that the accrual of a spouse's estate is the amount with which the net value of his estate at the time of the dissolution of the marriage exceeds the net value of the estate at the time of the conclusion of the marriage. It needs to be noted that on the day of the divorce order, the accrual still had to be calculated and determined, and the same counts for the 50% pension interest. The effect thereof is that, at the dissolution of the marriage, the 50% pension interest had not formed part of the

net value of the Plaintiff's estate, strictly speaking. Of further significance is the fact that the order relating to the pension fund was made after the dissolution of the marriage had taken place. It could therefore not form part of the Plaintiff's estate for purposes of the accrual.

- [8] In the judgment itself, Murray, AJ had the following to say in paragraph 103 thereof: "In the present matter... the Plaintiff is in my view clearly entitled to share in the accrual as calculated on date of divorce. The Plaintiff is entitled to what is due to her over and above the 50% of the Defendant's pension interest if it should transpire at the calculation of the accrual as on date of divorce that she is entitled to further amounts in terms of Section 3 of the Matrimonial Property Act."

[1] 2014 (6) SA 233 (GJ)

[2] 2001 (2) SA 844 (W)

[3] 2010 JOL 26003 (NCK)

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