

SOUTH AFRICA / JUDGMENT

# B.H v C.T.M (A54 / 2020) [2022]

## ZAMPMBHC 8 (18 February 2022)

[2022] ZAMPMBHC 8

## COURT

Mbombela High Court, Mpumalanga

## BEFORE

TV Ratshibvumo, MF Legodi

## CASE / FILE NUMBER

A54 / 2020

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## SAFLII

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## Policy

## THE

## HIGH COURT OF SOUTH AFRICA

## MPUMALANGA

## DIVISION, MBOMBELA MAIN SEAT

## CASE

## NO: A54 / 2020

## REPORTABLE:

NO  
OF  
INTEREST TO OTHER JUDGES: NO  
REVISED.  
18  
FEBRUARY 2022  
In

## the matter between:

B[....]  
H[....]  
APPELLANT  
and  
C[....]  
T[....]  
M[....]  
RESPONDENT

Delivered:

This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10H00 on 18 FEBRUARY 2022.

J

U D G M E N T  
RATSHIBVUMO

J:

[1]

Introduction.

This

is an appeal against an order made by Mhala Regional Court (court a quo) in a judgment handed down on 22 July 2020. In that judgment, following a trial in a divorce action, the court a quo ordered that “pension interest held by the defendant under pension number 96956170 with Government Employees Pension Fund (the GEPF) for the period 02 February 2013 till date of divorce, to be paid to the defendant within 60 (sixty) days from the date of divorce.” The

Appellant (the Defendant in the court a quo) appeals against the part of order that prescribes the date on which the pension calculations should commence, being 02 February 2013 (the date found by the court a quo as the date of the marriage between the parties). The Appellant contends that the order should have been that ‘50% of the pension interest as at the date of divorce should be paid to the Appellant.’ The appeal is opposed by the Respondent.

[2]

Background.

The

Appellant had issued divorce summons against the Respondent at the Mhala Regional Court. According to the particulars of claim, she was

in a customary marriage with the Respondent with effect from 02 February 2013. Undisputed evidence led before the court was that she

and the Respondent had been staying together since 2004 and have two children; a boy born on 09 May 2009 and a girl born on 27 May 2013.

She claimed inter alia, for an order in terms of sections 7(8) of Act 70 of 1979 in terms of which the GEPF is ordered to pay an amount equal to the net worth of Respondent’s interest before tax and at the date of divorce to the Appellant within 60 (sixty) days of the date of divorce.

[3]

The matter went through the trial because the Respondent disputed

the  
existence of a marriage between him and the Appellant. A number of  
witnesses were called by the Appellant and the Respondent  
after  
which, the court a quo found that there was indeed a valid  
customary marriage between the Appellant and the Respondent. Prior to  
handing down the judgment,  
the court a quo invited the parties  
to also address it on the date on which the pension calculations  
would commence. The Respondent grabbed the  
opportunity to argue that  
the pension interest should be calculated from the date of marriage.  
The Appellant was opposed to this  
as per the heads of arguments  
presented before the court.

[4]

The law.

The

authority of the court to order the division of the pension interest  
is derived from section 7(7) and 7(8) of the Divorce Act,  
no. 70 of  
1979 (the Act) which provides,

“(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.

...

(8) Notwithstanding the

provisions of any other law or of 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 that member which, by virtue of subsection (7),  
is due or assigned to the other party to  
the divorce action

concerned, shall be paid by that fund to that other party when any  
pension benefits accrue in respect of that  
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 that other party and that  
the administrator of the pension  
fund furnish proof of such

endorsement to the registrar, in writing, within one 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.”

[5]

In Ndaba

v Ndaba[1],

the Supreme Court of Appeal (the SCA) had to answer a question on  
whether the parties were entitled to each other pension's  
interest where the settlement agreement made an order of court was  
silent on the division of the pension. The SCA held the following,  
“it would be

inimical to the scheme and purpose of s 7(7)(a)

if it only applies if the court granting a divorce makes a  
declaration that in the determination of the patrimonial benefits to  
which the parties to a divorce action may be entitled, the pension  
interest of a party shall be deemed to be part of his or her  
assets.

The grant of such a declaration would amount to no more than simply  
echoing what s 7(7)(a)

decrees. For the same reasons it was not necessary for the parties in  
this case, to mention in their settlement agreement what  
was obvious,

namely that their respective pension interests were part of the joint  
assets which they had agreed, would be shared  
equally between

them.”[2]

[6]

The relevance of the above is to demonstrate that the pension  
interest

form part of the joint estate when parties are married in  
community of property. There was no dispute in respect thereto before  
the court a quo. There is therefore no doubt that an order  
limiting the calculation of the pension interest benefit to a date  
much later than the

pension interest started accruing in the pension  
fund, deprived the Appellant of a share she otherwise was entitled to  
as part

of the joint estate. The question before us is therefore  
whether the court a quo had the authority to determine the  
date of marriage as the date from which the pension interest should  
be calculated. In my view,

there are two scenarios through which the  
court would have the discretion to make such an order. The first  
would be when forfeiture

order is made in terms of section 9 of the

Act and second would be when a court determines the accrual

calculation.

[7]

Section 9 of the Act provides,

“9.

Forfeiture of patrimonial benefits of marriage.—(1)

When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court,

having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in

relation to the other be unduly benefited.”

[8]

In the

heads of argument, the Respondent conceded that the only source of authority the court a

quo

could have used in making the order as it did, would be would be the above section. This section that empowers a court to order forfeiture

of benefits. The Respondent argued though, that the court’s discretion should be exercised judiciously as was done by the court a

quo.

While section 9 above empowers a court to make a forfeiture order (which it ultimately did without using those specific words), that

was not the case pleaded before the court. In other words, the Respondent did not claim forfeiture of benefits against the Appellant. The case before the court was whether there was a customary marriage between the parties. If the court was to find that there was such a marriage, it would mean that they were married in community of property.[3]

[9]

The

argument that the court a

quo

exercised its discretion judiciously cannot stand in the circumstances were such an order is granted without any consideration of factors that the Act provides that they should be considered.

These would be ‘the

duration of the marriage, the circumstances which gave rise to the break-down and any substantial misconduct on the part of either of

the parties,’ These factors were not placed before the court as none of the litigants asked for the forfeiture of benefits order.

To make an order for forfeiture of benefits where none is asked for would be a misdirection, entitling the court of appeal to interfere. Without any misdirection on the part of the trial court, the court of appeal is not entitled to interfere with its findings.[4]

[10]

The

question about the date from which the pension interest should be calculated was raised for the first time by the presiding officer

when the parties' legal representatives were making closing arguments. Prior to it being raised as such, it was not pleaded by

any of the parties. As indicated above, the wording of the order by the court a

quo,

resembles what one would have expected as an order in marriage out of community of property in which the accrual system applies, in that it

is the only legal provision from which a calculation of any contribution into one's estate is calculated from

the date of

marriage.[5]

[11]

I am therefore satisfied that there is no legal basis upon which the court ordered

that the pension interest be calculated from the date of marriage. I am also satisfied that in so doing, the Appellant was denied

a fair share of what she is entitled to benefit as she was married in community of property.

[12]

For these reasons, I would propose the following order:

[12.1] Appeal is upheld with costs.

[12.2] Paragraph 4 of the order of the court a quo is set aside and replaced with the

following:

[12.3] Pension interest held by the Defendant under pension no. 96956170 with the Government Employees Pension Fund, calculated up to the date of divorce to be paid to the Plaintiff.

TV

RATSHIBVUMO

JUDGE

OF THE HIGH COURT

I

agree and it is so ordered.

MF

LEGODI

JUDGE

PRESIDENT

MPUMALANGA  
DIVISION OF THE HIGH COURT  
FOR

THE APPELLANT: : MS. S THOBELA  
INSTRUCTED  
BY  
: THOBELA SINDY ATTORNEYS  
: NELSPRUIT  
FOR  
THE RESPONDENT  
: NO APPEARANCE  
DATE  
HEARD  
: 28 JANUARY 2022

## JUDGMENT

### DELIVERED

: 18 FEBRUARY 2022

- [1] 2017 (1) SA 342 (SCA) para 25.
- [2] See also CM v EM 2020 (5) SA 49 (SCA) which confirms the principle that pensions interest forms part of the joint estate in marriages in community of property.
- [3] See section 7(2) of the Recognition of Customary Marriages Act, no. 120 of 1998 which provides, “(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.” This Act came into operation on 15 November 2000.
- [3] See section 7(2) of the Recognition of Customary Marriages Act, no. 120 of 1998 which provides,
- “(2) A customary marriage entered into after the commencement of this Act in which a spouse is not a partner in any other existing customary marriage, is a marriage in community of property and of profit and loss between the spouses, unless such consequences are specifically excluded by the spouses in an antenuptial contract which regulates the matrimonial property system of their marriage.” This Act came into operation on 15 November 2000.*
- [4] See Minister of Safety and Security and Others v Graig and Another NNO 2011 (1) SACR 469 (SCA).

[5] See section 4 of the Matrimonial Property Act which provides, “4. Accrual of estate.—(1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.”

[5] See section 4 of the Matrimonial Property Act which provides,

*“4. Accrual of estate.—(1) (a) The accrual of the estate of a spouse is the amount by which the net value of his estate at the dissolution of his marriage exceeds the net value of his estate at the commencement of that marriage.”*

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Prepared on 9 October 2026 · Esheria