

SOUTH AFRICA / JUDGMENT

M v SALA Pension Fund (2021/5781)

[2021] ZAGPJHC 444 (31 August 2021)

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COURT

South Gauteng High Court, Johannesburg

BEFORE

A. De Wet

CASE / FILE NUMBER

2021/5781

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE NUMBER: 2021/5781

REPORTABLE: NO

OF INTEREST TO OTHER

JUDGES: NO

REVISED: YES

31 AUGUST 2021

In the matter between:

M[...]¹M[...]² E[...]³ M[...]³

Applicant

(Identity

Number: [...])

and

SALA

PENSION

FUND

Respondent

JUDGMENT

DE WET AJ:

1. This is an application in terms whereof the applicant, the former spouse of Mr H[....] Z[....] T[....] (“the deceased”), seeks an order against the respondent, the South African Local Authorities Pension Fund, a pension fund organisation registered in terms of section 4 of the Pension Funds Act, 27 of 1956:
 - 1.1 Declaring that she is entitled to 50% of the deceased’s pension interest which accrued to him at the date of divorce between the applicant and the deceased, in terms of a decree of divorce dated 2 March 2000, which incorporated the terms of a settlement agreement entered into between them (“the court order”);
 - 1.2 declaring that the court order dated 2 March 2000 is binding on the respondent;
 - 1.3 directing the respondent to pay 50% of the deceased’s pension interest accrued at the date of divorce to the applicant;
 - 1.4 directing the respondent to disclose the names of the beneficiaries to whom the respondent had paid the pension fund interest consequent upon the deceased’s death;
 - 1.5 costs of the application in the event that the application is opposed.
2. The applicant did not in her heads of argument or in argument persist with her claim that the respondent disclose the names of the beneficiaries to whom the respondent had paid the pension fund benefit consequent upon the deceased’s death. It appeared however, during the respondent’s argument, that she is aware of who the beneficiaries are. Accordingly, it is not necessary to decide this issue.
3. The applicant and the deceased were formerly married to one another in community of property, which marriage was dissolved by decree of divorce issued by the Central Divorce Court, held at Vereeniging, on 2 March 2000 under case number 7351/99 (hereinafter referred to as “the court order”). The deceased, during his life, was a member of the South African Police Force and as a result he was a member of the South African Local Authorities Pension Fund.
4. The relevant portion of the settlement agreement, which settlement agreement was in manuscript, was incorporated in the court order, reads as follows:

“2. 50% (half) the pension fund of the Defendant accruing from the date of divorce to the date of payment is awarded to the Plaintiff – the endorsement should be entered on the pension records to that effect.”

(own emphasis)
5. The issues herein are to be determined against the following statutory context.

5.1 The Divorce Act, 70 of 1979 (the “Divorce Act””)

5.1.1 In terms of section 1 of the Divorce Act:

5.1.1.2 ‘pension interest’, in relation to a party to a divorce action who-

(a) is a member of a pension fund (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 been terminated on the date of the divorce on account of his resignation from his office:”

5.1.2 Section 7(7)(a) reads as follows:

“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.”

5.1.3 Section(7)(8) reads as follows:

“(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 the receipt of such notification;”

5.2 The Pension Funds Act, 24 of 1956 (the “Pension Funds Act”>)

5.2.1 A dependant of a member of a pension fund is defined in section 1 of the Pension Funds Act as, in relation to a member, a person in respect of whom the member is legally liable for maintenance, or in respect of whom the member is not legally liable for maintenance, if such person was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance, is the spouse of the member; or is a child of the member.

5.2.2 The relevant sections of the Pension Funds Act read as follows:

“37C Disposition of pension benefits upon death of member

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit ... payable by such a fund upon the death of a member, shall, ... not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
 - (a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.”

(own emphasis)

5.2.3 Section 37D makes provision for certain deductions from pension benefits. The relevant portions read:

“37D Fund may make certain deductions from pension benefits

- (1) A registered fund may-
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) deduct from a member’s or deferred pensioner’s benefit, member’s interest or minimum individual reserve, or the capital value of a pensioner’s pension after retirement, as the case may be-
 - (i) any amount assigned from such benefit or individual reserve to a non-member’s spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under Islamic law pursuant to its dissolution;

...

- (4)
 - (a) For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary

marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary

marriage is granted, and, on the written submission of the court order by the non-member spouse-

- (i) must be deducted by-

- (aa) the pension fund or pension funds named in or unidentifiable from the decree;
 - (bb) the pension funds or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;
 - (ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b)(ii), the date on which that period expires; and
 - (iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree.
- (b)
- (i) The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.
 - (ii) The non-member spouse must within 120 days of being requested to make an election-
 - (aa) inform the pension fund of how the amount referred to in subparagraph
 - (i) must be dealt with; and
 - (bb) if he or she elects that the amount must be paid to him or her directly, provide the pension fund with the details of how that payment must be effected; or
 - (cc) if he or she elects that the amount must be transferred to a pension fund on his or her behalf, provide the pension fund with the details of that pension fund.
 - (iii) The pension fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse's election.
 - (iv) In the event that the non-member spouse fails to make an election or identify the pension fund to which the amount should be transferred within the period referred to in subparagraph (ii), the pension fund must pay the amount directly to the non-member spouse within 30 days of the expiry of that period.
 - (v) Despite subparagraph (iv), in the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the pension fund must retain the amount and any fund return referred to in paragraph (c) (ii) in the pension fund until such time as details of how that payment must be effected is made available to the pension fund by the member, the non-member spouse or any other person.
- (c) A non-member spouse-
- (i) is not a member or beneficiary in relation to the pension fund; and

- (ii) is entitled to the accrual of fund return from the date of the deduction contemplated in paragraph (a) (ii) until payment or transfer thereof, but not to any other interest or growth."
6. The applicant did not attempt to enforce her rights in terms of the court order until the passing of the deceased, almost twenty years after the date of divorce. The applicant was not a dependant of the deceased at the time of the deceased's passing.
 7. After the passing of the deceased the applicant approached the respondent and demanded her portion of the deceased's pension. The applicant explains in an affidavit, which is dated 3 September 2020 and which was prepared in support of a claim submitted by her former attorneys of record, Frans Mashele Incorporated, to the respondent, that at the time of her divorce and signing of the settlement agreement she had not been informed by her attorney that the full pension fund details had to be incorporated into the Settlement Agreement in order for her to have a claim against the pension fund. She further explained that she delayed in claiming her entitlement as she and the deceased had agreed that she would produce the settlement agreement to the fund administrators upon him going on pension. This did not realize as he passed whilst still in service.
 8. The applicant testified that she submitted her claim to the respondent, that correspondence was exchanged between her and the administrators of the respondent, subsequent to which her claim was rejected on the grounds more fully set out hereunder. The applicant took various steps and approached inter alia the administrators of the respondent as well as the Family Court, Johannesburg for assistance.
 9. The applicant approached Mr Richard Maluleke, the assistant registrar of the Family Court of Johannesburg, on 5 August 2020 for assistance after she had been informed by the respondent that she had to amend the court order to include the name of the respondent. Mr Maluleke in a letter addressed to the respondent, recorded that the deceased had passed away and that it would be difficult for the applicant to amend the court order. He suggested that the respondent consider "other option to avoid burrying (sic) her under huge legal costs".
 10. On 22 December 2020, the applicant's present attorneys of record, Mohanoe Incorporated Attorneys, addressed a letter of demand to the respondent recording certain historic events that included payment having been made to beneficiaries and requesting a copy of the rules of the respondent.
 11. On 19 January 2021 the respondent, in its response to the letter of demand dated 22 December 2020, inter alia provided the applicant a detailed explanation of the grounds upon which it relied in rejecting the applicant's claim. It referred the applicant to the provisions of sections 1, 7(7) and (7)(8) of the Divorce Act as well as section 37D of the Pension Funds Act. It informed the applicant that in order to be binding on the respondent the court order had to comply with the foresaid sections. The respondent advised that whilst the applicant and the deceased had concluded a settlement agreement which was made an order of court, it was not binding on the respondent and that she should submit a claim against his estate.

The respondent further referred the applicant to section 37C of the Pension Funds Act and advised her that upon the deceased's death the death benefit becomes payable to the dependants. As she was neither a dependant nor a nominee of the deceased pension she was not entitled to receive any benefits and neither was she entitled to the information sought in her letter of demand dated 22 December 2020.

12. The court order upon which the applicant relies does not confirm the applicant's entitlement in terms of section 7(7) of the Divorce Act. The settlement agreement records that the applicant is entitled to half of the deceased's pension fund accruing from the date of divorce to the date of payment, being an entitlement other than that which ex lege exists as a consequence of the marriage in community of property.
13. Ms Makhoebe inter alia submitted that the applicant is entitled to the relief sought against the respondent as:

13.1 The applicant and the deceased were married to one another in community of property as a consequence whereof, at date of divorce the deceased's pension interest was an asset in the joint estate. This is common cause;

13.2 In respect of marriages in community of property, the absence of an order in terms of section 7(7) does not of itself deprive the non-member spouse of its entitlement to the pension interest as it was an asset in the joint estate. This too, is common cause;

13.3 Consequently, the applicant is entitled to 50% of the deceased's pension interest as at date of divorce irrespective of whether the divorce order specifically directed so in terms of section 7(7) (a) of the Divorce Act. The applicant relied in argument on the dicta in *Kotze v Kotze* 2013 JOL 30037 (WCC) and particularly *GN v JN* 2017 (1) SA 342 (SCA) at paragraph 25. This is not in dispute;

13.4 The applicant further submitted that, on a proper reading of section (7)(8) of the Divorce Act, the provisions of that section:

13.4.1 did not oblige the court granting the decree of divorce to assign a portion of the pension interest of the member spouse to the non-member spouse or make a declaration in that regard;

13.4.2 does not require that the pension fund need be identified to oblige it, and herein the respondent, to pay the non-member spouse their assigned portion of the member's pension interest. She submitted that the court order was sufficient to enable her to enforce her claim against the respondent;

13.4.3 Consequently, she concluded, that the applicant is entitled to enforce her rights in the court order against the respondent.

14. Herein lies the dispute.

15. The respondent was not a party to the divorce action and neither is it identified in the court order as the relevant pension fund. The settlement agreement that was made an order of court further records an entitlement other than the applicant's entitlement in terms of section 7(7) of the Divorce Act. There is a difference between the applicant's entitlement in terms of the court order and her entitlement in terms of section 7(7) of the Divorce Act. There is further a contradiction in prayer 1 of the applicant's notice of motion in that the terms of that prayer and the terms of the court order, which the applicant seeks to enforce in prayer 1, are irreconcilable.
16. Notwithstanding having been advised to do so, the applicant has not sought to amend the court order in this application or any other application, be it to identify the respondent as required in terms of section 7(8) of the Divorce Act, or otherwise.
17. Mr Khumalo SC, for the respondent, correctly points out that the court order does not name or identify the respondent and neither does it direct the respondent to make payment of any amount or part of the deceased's pension interest to the applicant. Absent such identification and direction the respondent is not bound by the court order. He referred to *Nhlapo v Iscor Employees Provident Fund & another* [2020] 3 BPLR 849 (PFA)[1] in which the pension fund adjudicator, at page 854, paragraph 5.4, confirmed that in terms of the applicable legislation a pension fund can only make a "divorce payment" if the court order is binding on the fund and to be binding it should meet certain criteria which include that the court order must be valid, the member spouse should be a member of the fund at the date on which the court order is granted, it must specify the pension interest assigned to the non-member spouse, the fund must be identified by name or at least should be identifiable for the court order and the fund must be ordered to pay the non-member spouse.
18. Mr Khumalo SC further submitted that the respondent could only make deductions from member's pension interest in very limited circumstances and strictly according to the enabling provisions of Pension Funds Act. The respondent could only, he submitted, make a deduction from the deceased's pension interest for the purposes of section 7(8) of the Divorce Act as provided in section 37D(4)(a) of the Pension Funds Act. Section 37D(4)(a)(i) (aa) provides that a pension fund that may make a deduction from a member's pension interest aforesaid is the

pension fund mentioned in or identifiable from the decree, being the court order.

19. Mr Khumalo SC in opposition to the applicant's claim also relied on *GN v JN supra*, particularly paragraph 37 in which the Supreme Court of Appeal held that:

"[37] Section 7(8), on the other hand, creates a mechanism in terms of which the Pension Fund of the member's spouse is statutorily bound to effect the payment of the portion of the pension interest (as at the date of the divorce) directly to the non-member spouse as provided for in s 37D(1)(d)(i) of the Pension Funds Act, 24 of 1956 and s 21(1) of the Government Pension Law, 1996. This is as far as s 7(8) goes and no further. The non-member spouse is thereby relieved of the duty to look to the member spouse for payment of his or her share of the pension interest with all its attendant risks. The remarks by

this court in relation to s 7(8)(a), in Old Mutual Life Assurance Co (SA) Ltd & Another v Swemmer 2004 (5) SA 373 (SCA) are instructive. It said the following (para 20):

‘Once a part of the pension interest of the member spouse becomes “due” or “is assigned” to the non-member spouse in the course of the divorce proceedings, the Court may order that such part of the pension interest must be paid by the pension fund concerned to the non-member spouse when any pension benefits accrue in respect of ‘the member spouse’ ...’.

(Own emphasis).

20. The respondent submitted that the mechanism created by section 7(8) of the Divorce Act in terms whereof the respondent is bound to make payment, being a court order issued in terms of section 7(8) of the Divorce Act directing that an identified pension fund, the respondent herein, make payment of the specified portion of the member’s pension interest assigned to the non-member spouse, is absent in this matter. Absent the inclusion of such provision, Mr Khumalo SC submitted, correctly so, the non-member spouse, being the applicant, is obliged to seek satisfaction for the benefit assigned to her in the court order directly from the member spouse or his estate.
21. The respondent further submitted that the court order upon which the applicant relies is fatally defective in that:
 - 21.1 it incorrectly defines the interest to which the applicant is entitled as 50% (half) of the pension fund of the deceased accruing from the date of divorce to the date of payment rather than 50% of his pension interest as at date of divorce;
 - 21.2 it does not identify the respondent or direct the respondent to make any payment to the applicant.
22. The entitlement of the applicant on divorce was not, as is contained in the order, 50% of the deceased’s pension fund, but 50% of his pension interest at date of divorce. The further difficulty with the court order is that it defines the applicant’s entitlement as the pension fund that accrues as from date of divorce until date of payment. These provisions are contradictory and further demonstrates the need to have had the court order amended.
23. As a consequence of 21.2 above, the respondent submitted the court order is not binding on the respondent. The pension funds adjudicator has consistently held in various matters that in the absence of compliance with the above, the decree of divorce or court order must be amended to satisfy the above requirements. The applicant was advised to do so but elected not to.
24. The applicant contended that the respondent acted improperly when, upon the deceased having passed away, it paid out the proceeds of the deceased’s pension to the beneficiaries thereof, including dependants of the deceased, whilst being aware that she had a claim against it.

25. The respondent is obliged, in terms of section 37C of the Pension Funds Act, upon the death of the deceased, to pay the pension benefits to the deceased's dependants or nominees. The respondent had no discretion in the matter. As at date of the hearing of this application the respondent had already distributed the benefits to the beneficiaries and dependants of the deceased as it was obliged to do. The applicant was neither a dependant nor a nominee of the deceased and accordingly she was not entitled to receive any benefits in terms of section 37C.

1.5cm; text-indent: -1.5cm; margin-bottom: 1cm; line-height: 150%"> 26. In light of the above, I am not persuaded by the submissions made by the applicant that the respondent acted improperly herein.

27. On considering the terms of the court order, the applicable legislation, particularly section 7(8) of the Divorce Act read with section 37D(4) of the Pension Funds Act, and the judgement by the Supreme Court of Appeal in GN v JN supra, by which this court is bound, this court finds that whilst the applicant may be entitled to 50% of the deceased's pension

interest as at date of divorce, the respondent, absent compliance with section 7(8) of the Divorce Act, is not bound by the court order and consequently not obliged to pay to the applicant 50% of the deceased's pension interest as at the date of divorce.

28. The applicant submitted that this court is obliged to interpret the applicable legislation as well as to develop the common law such as to promote the spirit, purpose and objects of the Bill of Rights. It could not have been the intention of the legislature, the applicant submitted, to punish the legally unrepresented litigants when it enacted section 7(8)(a) of the Divorce Act.

30. The applicant is an unemployed woman of 60 years of age. The respondent does not dispute that the applicant will suffer hardship as a consequence of the court order made herein. The applicant will be obliged to seek redress against the deceased's estate. This may prove difficult as she is impecunious and not able to pay legal fees.

31. This court has a discretion when determining the issue of costs. In determining the respondent's claim for costs, the facts of this matter are taken into account as well as the applicant's circumstances.

32. Consequently, I make the following order:

32.1 The application is dismissed.

A. DE WET

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

Heard:

18 August 2021

Judgment:

31 August 2021

Applicant's Counsel: Adv. M G Makhoebe

Instructed by:

Mohanoe Incorporated Attorneys

Respondent's Counsel: Adv. S Khumalo SC

Instructed by:

ZNS Incorporated Attorneys

[1] See *Rampa v Sentinel Mining Industries Retirement Fund* [2014] 1 BPLR 106 (PFA)

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