

SOUTH AFRICA / JUDGMENT

M.C.M v M.M and Others (34709/2003) [2020] ZAGPPHC 505 (9 September 2020)

[2020] ZAGPPHC 505**COURT**

North Gauteng High Court, Pretoria

BEFORE

Skosana

CASE / FILE NUMBER

34709/2003

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****[GAUTENG****DIVISION, PRETORIA]****(1)****REPORTABLE:**

YES

/ NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 34709/2003

In

the matter between:-

M[...]

C[...] M[...]

Applicant

and

M[...]
M[...]
First Respondent
GOVERNMENT
EMPLOYEE PENSION FUND
Second Respondent
MOTLOBA
ATTORNEYS
Third Respondent
In

re: M[...]
C[...] M[...]
Plaintiff
M[...]
M[...]
Defendant

JUDGMENT

SKOSANA AJ

- [1] In this application, the applicant seeks an order that the first respondent's pension benefits held by the Government Employees Pension Fund ("GEPF") under pension no. [...] be divided into half between the applicant and the first respondent. The notice of motion is not elegantly worded but effectively the relief sought is as stated above. The GEPF is cited as the second respondent while the first respondent's attorneys are cited as third respondent.
- [2] The facts of this matter are quite straight forward. The applicant was married to the first respondent in terms of customary law until the marriage was dissolved through a court order on 01 August 2007. It is common cause that in addition to the dissolution of the marriage, the court also ordered that the joint estate be divided into equal halves between the applicant and the first respondent. The first respondent made much of the fact that the court order was

granted by default on the basis of the first respondent's counter claim after the applicant had been ipso facto barred from pleading against such counter claim. I do not find this aspect of any relevance in the light of the view that I take as appears later herein under. Both parties agreed that the marriage was in effect a marriage in community of property.

- [3] A number of other issues were brought to the fore but which for the same reason as stated above, I find unhelpful in regard to the issue for determination in this matter. These include for instance the allegation that the first respondent sold a house which belonged to the joint estate without the consent or the involvement of the applicant as well as the counter allegation by the first respondent that the applicant received her pension benefits and expended them without sharing any portion thereof with the first respondent. These averments and contentions cannot have a bearing on the determination

of the main and only issue in this case, namely whether or not the applicant's 50% of the first respondent's pension

benefits from the GEPP share should be secured.

[4] The present application was instituted in 2019 notwithstanding that the marriage was dissolved in August 2007. However, I have been assured that the pension benefits of the first respondent are still secure with the GEPP as the first respondent remains employed by the Department of Education.

[5] Before dealing with the merits and other aspects of the application, it is necessary first to deal with the issue raised by the applicant against the first respondent's opposing affidavit, namely that such affidavit is invalid in that it does not comply with the Regulations Governing the Administration of Oaths or Affirmation[1]. It appears that the applicant bases this objection only on the omission by the Commissioner of Oaths to insert the date on the

Commissioner's attestation certificate to the first respondent's opposing affidavit.

[6] It has been repeatedly held, though not consistently, that the provisions of this Regulation are directory and not preremptory[2]. I am of the view that there has been substantial compliance with the Regulation in this case. The omission is trivial. Moreover, there is no prejudice to the applicant who has filed a comprehensive replying affidavit against the first respondent's opposing affidavit. I am therefore inclined to condone any non-compliance with such Regulation.

[7] Turning to the main issue, it is sufficient to mention the case of GN v JN [3] where it was held that where the parties are married in community of property the pension benefits of the parties form part of the joint estate. This decision was also confirmed in Wiese v GEPP & Others[4]. In both cases, the SCA and the Constitutional Court were adidem that the pension benefits of the spouses form part of their matrimonial

property and therefore of their joint estate by virtue of section 7 of the Divorce Act 70 of 1979.

[8] The court, in GN case went further to hold that, all that section 7 (8) of the Divorce Act does, is to create a mechanism in terms of which the pension fund of the member/spouse is statutorily bound to effect payment of that

portion of the pension directly to the non-member spouse[5]. In other words, section 7(8) of the Divorce Act does not establish a right for the non-member spouse to acquire the portion of the pension funds but creates a mechanism to enforce such right which already exist in terms of sub-section (7) thereof. In the present case, the court order of 01 August 2007 granted the right for the applicant to acquire half of the pension benefits of the first respondent but did not provide for the mechanism to secure such right. The applicant now seeks the addition of such mechanism.

[9] In my view, the above approach has rendered it unnecessary to deal at all or in any detail with the issues of delay and condonation. This is because if the right existed as on the date of the dissolution of the marriage, there is no need to condone the enforcement thereof at this stage. Moreover, it is a well-established principle that the

portion of the pension benefits to which the applicant is entitled accrued as on the date of the dissolution of the marriage accompanied

by the granting of the order of the division of the joint estate. Hence the applicant is only entitled to a 50% share of the pension

benefits of the first respondent which had already accrued as on the date of the dissolution of the marriage. She is not entitled to half of the interest or amounts which may have accrued after that date.

[10] The first respondent's argument that the applicant enjoyed her own pension benefits alone without sharing any portion thereof with the first respondent is neither here nor there. For that to be factored, the first respondent would have had to bring a counter application claiming such portion of her pension benefits or be made from the present claim of the applicant a deduction of the amount to which he would have been entitled from the applicant's pension funds. The first respondent has not brought such counter application and can therefore not be assisted in this regard.

[11] I have already indicated that the applicant merely seeks to enforce a right which already existed as at the time of the dissolution of the marriage. In view of that approach, it is not necessary for me to deal with the issues regarding the delay and/ or the condonation. However, in so far as it may be necessary or contended that the applicant has unreasonably delayed in bringing this application, I condone such delay mainly because no prejudice has been or will be suffered by the first respondent especially because such pension benefits are still under the possession and care of the GEPPF.

[12] As far as costs are concerned, both parties agree that I have a discretion in that regard. The application was instituted about 12 years after the dissolution of the marriage. In the manner in which the prayers are couched in the notice of motion, the cause of action is based on variation in terms of Rule 42 of the Uniform Rules. Such application had to be brought within reasonable time. The belated enforcement of the applicant's rights reasonably occasioned the resistance from the first respondent who, rightly or wrongly, was advised to oppose the application. I do not find his opposition to have been unreasonable or vexatious by any measure. Taking into account the previous relationship that the parties have had, I do not

think that a costs order against either one of them would be appropriate in the circumstances.

[13] In the circumstances I make the following order:

[13.1] Condonation for non-compliance of the first respondent's opposing affidavit with the Regulation governing the administering of Oaths is hereby granted, in so far as it may be necessary.

[13.2] The second respondent (Government Employees Pension Fund), is hereby ordered to pay to the applicant an amount equal to 50 % of the first respondent's pension fund benefits and interest as calculated on 01 August 2007 and held by the GEPF under pension no. [....].

[13.3] The second respondent is directed to pay such pension benefits and interest into the applicant's bank account detailed as FNB, Account no. [...] when such pension benefits and interest become due and payable to the first respondent.

[13.4] The second respondent is directed to make an endorsement in its records of the applicant's entitlement to such portion of the benefits as set out above.

[13.5] There is no order as to costs.

DT SKOSANA

Acting Judge of the High Court

APPEARANCES:

Applicant:

Adv S.K Mojamabu

Instructed by:

Maponya Attorneys

1st Respondent:

Mr B.W Motloba

Instructed by:

Motloba Attorneys

2nd Respondent:

None- appearance

3rd Respondent:

None-appearance

Date of Hearing:

7 September 2020

Date of Judgment:

_09 September 2020

- [1] Issuedd in terms of section 10 of the Justices of Peace and Commissioners of Oaths Act 16 of 1963
- [2] Lohrman v Vaal onvekelings maaskape (adms) Bpk 1979 (3) SA 391 (T) at 396 H-397 A; S v Kahn 1963 (4) SA 897 (A) at 900 (C)
- [3] 2017 (1) SA 342 (SCA) para 26
- [4] 2012
- (6) BCLR 3599 (CC) paras 5 to 8
- [5] GN case (supra) para 27

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