

SOUTH AFRICA / JUDGMENT

M.C.M v M.R.M and Another (DIV 129/2012) [2014] ZANWHC 31 (30 October 2014) [2014] ZANWHC 31

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

DIV 129/2012

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**IN THE HIGH COURT
OF SOUTH AFRICA
(NORTH WEST HIGH
COURT, MAFIKENG)
CASE
NO.: DIV 129/2012**

DATE:

**30 OCTOBER 2014
In the matter**

between:

**M C
M.....APPLICANT
And
M R
M.....1ST
RESPONDENT
NORTH WEST
UNIVERSITY PENSION FUND.....2ND
RESPONDENT**

JUDGMENT

HENDRICKS J:

- [1] The Applicant and the First Respondent were married to each other in community of property. The First Respondent was a member of the Second Respondent, administered by ABSA Bank. The First Respondent's membership interest in the Second Respondent constituted an asset in the joint estate of the Applicant and the First Respondent.
- [2] On 15 May 2012 the Applicant instituted an action for divorce against the First Respondent. This action was opposed by the First Respondent. Both the Applicant and the First Respondent prayed for the division of the joint estate. On 14 February 2014 the Applicant caused a letter to be dispatched to the Second Respondent, requesting that the First Respondent's pension not be paid out to him pending finalization of the divorce. On 28 February 2014 the First Respondent retired from his employment.
- [3] On 29 April 2014 the Applicant launched the present application on an urgent basis in which she seeks an order compelling the Second Respondent to pay half of the First Respondent's pension interest into the trust account of the Applicant's attorney. On 2 May 2014 this Court (per Gutta J) granted an order in the following terms:

"1. THAT: This application be dealt with as an urgent application and the Rules pertaining to forms and service be dispensed with in terms of Rule 6(12) of the Uniform Rules of Court.

2. THAT: Pending the final outcome of the divorce action instituted between the parties:-

2.1 The 2nd Respondent be and is hereby ordered to pay one half of the monies payable to the 1st Respondent on 5 May 2014, being in respect of a pension interest the 1st Respondent previously held at the 2nd Respondent, to the trust account of Maree & Maree Attorneys;

2.2 The monies referred to in prayer 2.1 herein above remains in the trust account of the attorney firm in whose trust account it was paid only to be paid out to the Applicant, alternatively to such party the Court may order in accordance with the final divorce order.

3. THAT: The relief sought in prayers 2 – 3 hereof be of immediate full force and effect and will operate as an interim order;
4. THAT: The Respondents are called upon to attend Court on 22 May 2014 and give reasons why this order should not be made a final order of Court;
5. THAT: This order be served on the 1st Respondent personally."

- [4] On 22 July 2014 this Court (per Kgoele J) granted a final decree of divorce incorporating the terms of the deed of settlement. Of relevance in the said deed of settlement is the portion that deals with the pension benefits, which reads thus:-

"2.1 PENSION FUND BENEFITS

2.1.1 Both the Plaintiff and the Defendant are each members of a Pension Fund. The Plaintiff is a member of the Government Employees Pension Fund and the Defendant is a member of the NORTH WEST UNIVERSITY PENSION FUND.

2.1.2 The Defendant hereby consents and authorize the administrators of his pension fund benefits (irrespective whether or not it is still regarded as a pension fund benefit) to pay an amount of R677 717.25 (SIX HUNDRED AND SEVENTY SEVEN THOUSAND SEVEN HUNDRED AND SEVENTEEN RAND AND TWENTY FIVE CENTS) in full and final settlement of the Plaintiff's claim in respect of the Defendant's pension fund benefits, to the Plaintiff, which amount shall be paid into the Trust Account of the Plaintiff's attorneys of which the particulars are as follows:

MAREE & MAREE ATTORNEYS TRUST ACCOUNT

FNB MAHIKENG

ACC NO.: 6.....

BRANCH CODE: 2.....

2.1.3 The Defendant concedes and accepts that he will have no claim whatsoever for any benefits arising from the Pension Fund of the Plaintiff.

2.1.4 If, for any reason what so ever, the said administrators of the Defendant's pension fund is prohibited to by the said pension fund to pay the amount of R677 717.25 (SIX HUNDRED AND SEVENTY SEVEN THOUSAND SEVEN HUNDRED AND SEVENTEEN RAND TWENTY FIVE CENTS) to the Plaintiff, and in the event of the said administrators paying the total pension fund benefit/ amount held by them to the Defendant, the Defendant agrees and undertakes to immediately pay the amount of R677 717.25 (SIX HUNDRED AND SEVENTY SEVEN THOUSAND SEVEN HUNDRED AND SEVENTEEN RAND TWENTY FIVE CENTS) to the Plaintiff's attorneys of record with the following banking details:

ACC NO.: 6.....

2.1.5 Should the Defendant be in breach of the provisions of Paragraph 2 hereof and the Plaintiff need to institute action against the Defendant for the recovery of the above mentioned amount, the Defendant undertakes to pay the Plaintiff's legal costs on an attorney and client scale."

[5] Ultimately, the return date of the rule nisi granted on 2 May 2014, was 9 October 2014 when this matter was argued. The First Respondent filed a notice to abide this Court's decision, whilst the Second Respondent opposed the application. Of relevance to the present matter is the provisions of the Divorce Act and the Pension Fund Act. Section 7(8)(a)(i) of the Divorce Act 70 of 1979 stipulates, inter alia, that the court granting a decree of divorce in respect of a member of a pension fund, may make an order that "any part of the pension interest of the member which 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 benefit accrue in respect of that member."

- [6] 'Pension interest' is defined as 'the benefits to which the member would have been entitled to in terms of the rules of the fund if his membership of the fund would have been terminated on the date of divorce on account of his resignation from office.' Therefore, a member's 'pension interest for purposes of the Act, and any divorce orders issued in terms thereof, ceases to exist on the date of termination of such member's service, and in effect becomes nil. Thus, in order for a fund to pay any part of the member spouse's 'pension interest' to the non-member spouse, a final divorce order to that effect must have been granted on a date, prior to the member's termination of service. The First Respondent's pension interest ceased to exist on 28 February 2014 when he retired, and he was accordingly no longer entitled to any benefit under the rules of the fund.
- [7] It has been contended on behalf of the Second Respondent that payment by the Second Respondent to anyone but the First Respondent would have been in breach of the provisions of Section 37(A) of the Pension Funds Act, 24 of 1956, ("PFA") which provides as follows:-

"Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the concerned may withhold or suspend payment thereof: Provided that the fund may pay such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependents of the member or

beneficiary or to a guardian or trustee for the benefit of such dependent or dependents during such period as it may determine."

The relief claimed in the notice of motion and which was granted in the form of a rule nisi, had now been subsumed by the settlement agreement, which was incorporated in the decree of divorce.

- [8] A pension fund's right to make deductions from a pension benefit is highly circumscribed and may be exercised only as expressly provided by sections 37A and 37D of the Pension Fund Act. Relevant for present purposes is section 37D which, in subsection (1)(d)(i), allows a fund to-

"deduct from a member's benefit or minimum individual reserve, as the case may be. . . . any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979;. . . ."

According to the provisions of subsection (4)(a) –

“the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce 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”.

[9] The Applicant’s entitlement, if any, must therefore have derived from the provisions of section 7(7) and section 7(8) of the Divorce Act, which deal with the pension benefits of a divorcing member of a pension fund. The subsections read:

“(7)(a) In the determination of the matrimonial 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 part.
- (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 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 shall 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.”

[10] “Pension interest” is narrowly defined in the Divorce Act and it refers to the value of the interest which a member of a pension fund, on the date of his divorce, has in the pension benefit that will accrue to him as a member of such fund at a certain future date. It is readily apparent from all these statutory provisions that what is contemplated is an award to the non-member spouse of any part of this interest (and no other amount held by the fund in respect of the member spouse) calculated as at the date of the divorce but with effect from a certain date in the future when the pension benefit accrues to the member spouse.

See: Eskom Pension and Provident Fund v Krugel and Another 2012 (6) SA 143 (SCA).

[11] The First Respondent retired on 28 February 2014 before the divorce was finalized. His pension interest which is a benefit determinable only at the time of his retirement, had already become payable to him before the divorce. Clearly, he could not again be deemed to become entitled to a retirement benefit. He simply no longer had a pension interest for purposes of sections 7(7) and 7(8) of the Divorce Act and section 37D(4)(a) of the PFA, which is specifically designed for purposes of section 7(8)(a) of the Divorce Act.

See: (1) Elesang v PPC Lime Ltd and Other 2007 (6) SA 328 (NCD).

(2) Eskom Pension and Provident Fund v Krugel and Another 2012 (6) SA 143 (SCA).

[12] I find the following dictum in the case of Eskom Pension and Provident Fund v Krugel 2012 (6) SA 143 (SCA) at paragraph [11] quite apposite:

“Pension interest’ is narrowly defined in the Divorce Act and it refers to the value of the interest which a member of a pension fund, on the date of his divorce, has in the pension benefit that will accrue to him as a member of such fund at a certain future date. It is readily apparent from all these statutory provisions that what is contemplated is an award to the non-member spouse of any part of this interest (and no other amount held by the fund in respect of the member spouse) calculated as at the date of the divorce but with effect from a certain date in the future when the pension benefit accrues to the member spouse. Once the pension benefit has accrued, i.e beyond the date of divorce, at which time the pension interest converts into a pension benefit, the provisions of s 7(7) and s 7(8) are no longer applicable.”

[13] Counsel for the Applicant placed reliance on the matter of Elesang v PPC Lime Ltd and Others 2007 (6) SA 3258 (NC). It was submitted that the material facts in the matter at hand are similar to the fact in the Elesang matter, and that the legal principles applied in the said case law referred to in that matter should be applied in the present case. To this end, so it was further submitted, it is necessary to note that, the present application before this Court, irrespective of the settlement agreement, is for the safe keep and securing of the First Respondent’s pension interest.

[14] The present matter at hand is distinguishable from the Elesang matter on the following basis:-

- In the Elesang matter the Applicant at that stage did not claim payment of her half share. In the present matter an exact amount to the rands and cents are already determined as the Applicant's half share of the pension benefits in the pension of the First Respondent.
 - The relief that was claimed in the Elesang matter was merely aimed at securing an amount equal to 50% off the accrued pension benefits, pending finalization of the divorce action. In the present matter the divorce is finalized and the accrued pension benefits need not be secured pending a divorce action. In fact the amount is determined and agreed upon to be paid by the First Respondent to the Applicant.
- [15] It was further submitted on behalf of the Applicant, that "the settlement of the divorce has no bearing on this application before Court in that the relief sought herein pertains to the safe keeping of the pension benefits which forms part of the joint estate; it is only after the securing of the pension benefits that payment thereof can become possible in terms of the settlement agreement in respect of the divorce action. . . . payment of any monies to the Applicant by the First Respondent is highly unlikely hence the drastic steps by the Applicant and hence the necessity to safekeep it."
- [16] With the greatest of respect to counsel, I beg to differ with regard to the aforementioned submission. As already alluded earlier on in this judgment that due to the fact that the First Respondent had retired, he no longer have a pension interest in the Second Respondent that must accrue to him sometime in the future. His pension interest ceased to exist on the date of his retirement, which date preceded the date of the divorce. So, at the time of the divorce, the First Respondent no longer had a pension interest in the Second Respondent. The First Respondent has a pension benefit to which the Applicant is entitled to the amount agreed upon in the deed of settlement that is incorporated in the decree of divorce.

Conclusion

- [17] In my view, the order applied for when it was applied for was not a competent order. As at the time of the launching of this application, the First Respondent had retired and the pension interest he had in the Second Respondent had ceased to exist. However, the Applicant is not without any remedy. Paragraph 2.1.4 of the deed of settlement, which was made an order of court by its incorporation into the decree of divorce, entitles the Applicant to payment of the agreed amount by the First Respondent. Perhaps it would be prudent for the Applicant to pursue that claim.

See: Eskom's case, *supra*.

- [19] Therefore, I am of the view, that the rule nisi should be discharged. There is no plausible reason why costs should not follow the result and be awarded to the successful party.

Order

- [20] Consequently, the following order is made:-

1. The rule nisi issued out of this Court on 2 May 2014 is discharged.
2. The Applicant is ordered to pay the costs of this application.

R D HENDRICKS

ACTING JUDGE PRESIDENT

APPEARANCES

DATE OF HEARING : 24th OCTOBER 2014

DATE OF JUDGMENT : 30th OCTOBER 2014

COUNSEL FOR THE APPLICANT : ADV. P .SMIT

COUNSEL FOR THE RESPONDENT : ADV.H. SCHOLTZ

ATTORNEYS FOR THE APPLICANT : HERMAN SCHOLTZ ATT.

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Prepared on 10 October 2026 · Esheria