

SOUTH AFRICA / JUDGMENT

Ngewu and Another v Post Office Retirement Fund and Others (CCT 117/11) [2013] ZACC 4; 2013 (4) BCLR 421 (CC) (7 March 2013)

[2013] ZACC 4

COURT

Constitutional Court

BEFORE

Van der Westhuizen, Mogoeng, Moseneke,
Froneman, Jafta, Mhlantla, Nkabinde, Skweyiya,
Zondo

CASE / FILE NUMBER

CCT 117/11

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CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 117/11

[2013] ZACC 4

In the matter between:

PHUMLA RUTH PATRICIA NGEWU

.....First

Applicant

WOMEN'S LEGAL CENTRE TRUST

.....Second

Applicant

and

POST OFFICE RETIREMENT FUND

.....First

Respondent

MINISTER FOR COMMUNICATIONS

.....Second Respondent

MINISTER FOR FINANCE

.....Third

Respondent

MINISTER FOR JUSTICE AND

CONSTITUTIONAL DEVELOPMENT

.....Fourth

Respondent

MAWETHU NGEWU

.....Fifth

Respondent

Heard on : 7 February 2013

Decided on : 7 March 2013

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Froneman J, Jafta J, Mhlantla AJ, Nkabinde J, Skweyiya J and Zondo J concurring):

Introduction

[1] This matter concerns the right to equality before the law and equal protection and benefit of the law, as guaranteed by section

9(1)1 of the Constitution. It seeks to address the anomaly arising from the failure to afford divorcees of members of the Post Office Retirement Fund (Fund) similar rights and advantages afforded to former spouses of members of funds subject to the Pension Funds Act² and the Government Employees Pension Law³ (GEPL). Divorced spouses of members of the pension funds regulated by these statutes can claim their share of their former spouse's

pension interest at the time of divorce. This is referred to as the “clean break” principle. However, divorcees of members of the Fund cannot claim the interest that they are entitled to at the time of divorce.

[2] The applicants are Ms Ngewu and the Women's Legal Centre Trust. The first and second respondents, the Post Office Retirement

Fund and the Minister for Communications, participated in the proceedings before this Court. The third respondent, the Minister for Finance, did not make submissions to this Court. The fourth respondent, the Minister for Justice and Constitutional Development,

did not oppose the relief sought and the fifth respondent, Mr Ngewu, did not respond to documents served on him.

[3] The applicants and the first and second respondents are in agreement that the differentiation has no rational basis and is

inconsistent with section 9(1).

[4] The dispute between them revolved around whether proposed legislative amendments to the Post Office Act⁴ would adequately address the constitutional deficiency, how long it would take for the amendments to become law and whether hearing argument should be postponed in anticipation of the amendments. On the morning of the hearing, the parties settled their disagreement. They jointly presented a draft order to the Court. The order now made is based on that agreement.

Background

- [5] The first applicant, Ms Ngewu, married the fifth respondent, Mr Ngewu, in community of property in October 1980. Mr Ngewu was at all relevant times employed by the Post Office and a member of the Fund. When they were divorced on 27 July 2007, Ms Ngewu was awarded a 50% share of Mr Ngewu's pension interest, but she is only entitled to payment of that share when the benefit accrues to him. This is because the Post Office Retirement Fund Rules (Rules of the Fund),⁵ read with the Pension Funds Act and the Divorce Act,⁶ do not make any provision for a pension benefit in the Fund to be deemed to accrue on divorce, so that the divorcee's share can be paid on divorce.
- [6] In September 2010 Ms Ngewu filed an application in the Western Cape High Court, Cape Town (High Court). Represented by the Women's Legal Centre, she challenged the constitutional validity of the Rules of the Fund and the Pension Funds Act, to the extent that they did not provide for the Fund to permit divorcees to redeem their pension interest on the date of the divorce. Ms Ngewu also sought an order to have her portion of Mr Ngewu's pension interest paid to her. This relief has since been abandoned. The High Court set the matter down for the hearing of argument on 1 December 2011.
- [7] Ms Ngewu also contacted the Fund and requested that action be taken to rectify the dubious constitutional position of the Rules of the Fund. The Fund contacted the Minister for Communications and drafted amendments to the Rules of the Fund and suggested appropriate amendments to the Post Office Act. The amendment process is currently still underway.⁷
- [8] During the same period, the High Court granted an order declaring the GEPL inconsistent with the Constitution and invalid in *Wiese v Government Employees Pension Fund and Others*.⁸ This is because that statute, similar to the Rules of the Fund at issue in this application, did not afford a former spouse of a member of the Government Employees Pension Fund the same rights, concerning the division of pension benefits upon divorce, afforded to former spouses of members of funds subject to the Pension Funds Act.
- [9] Wiese came before this Court for confirmation of the High Court's order. Ms Ngewu brought an application for direct access to this Court, requesting that her application be heard together with Wiese. Her application before the High Court was therefore postponed indefinitely (*sine die*) on 30 November
2011. Because in both Ms Ngewu's case and Wiese separate pension provisions were challenged on identical constitutional grounds, the two cases were set down to be heard on 28 February 2012.

[10] However, prior to the scheduled hearing, the offending provisions of the GEPL in Wiese were amended by Parliament to incorporate the “clean break” principle and thus resolved the constitutional defect. On 30 March 2012 this Court held unanimously that the constitutional issue was moot as the offending provisions had been amended.⁹

[11] As to Ms Ngewu’s application, in January 2012 the Fund sought postponement for 12 months to enable Parliament to amend the Post Office Act to incorporate the “clean break” principle. According to the Fund, 12 months was a reasonable estimate

of the time period necessary for the legislative process to run its course. The applicants did not oppose the request. The Court thus postponed the hearing to 7 February 2013.

[12] Closer to the hearing, the Court directed the parties to make further written submissions on the sufficiency of efforts undertaken

by the government to cure the apparent constitutional defect, including submissions on the amendment process. The respondents indicated that the legislative process was still underway and that the amendment would be finalised within six months. In view of that estimate, the respondents requested a postponement of eight months to allow for unforeseen delays.

[13] The applicants opposed any postponement and sought to proceed with the hearing on 7 February 2013. More notably, the applicants

took the position for the first time that the proposed legislative amendment would not, if enacted, cure the constitutional defect at issue.

[14] In submissions received just days before the hearing, the applicants argued that the proposed amendment does not in fact incorporate the “clean break” principle. This failure, the applicants posited, meant that the legislative process underway

for more than 12 months would not cure the constitutional defect that prevents Ms Ngewu and others in her situation from receiving their pension interest upon divorce. Given that the proposed legislative solution was no longer satisfactory, the applicants indicated that they would now ask the Court to incorporate the “clean break” principle by way of a reading-in remedy.

[15] At the hearing, the legal representatives of the parties indicated that they were able to reach an agreement and submitted a proposed order to the Court. This order included a suspended declaration of invalidity of the omission of the “clean break”

principle from the Post Office Act. In addition, an extensive reading-in of section 24A of the GEPL embodying the “clean

break” principle into the Post Office Act was proposed. The reading-in would be triggered only if, after eight months, the

Legislature failed to amend the Post Office Act to remedy the defect.

Conclusion

[16] It is appreciated that the parties have settled the dispute between them. But this Court is of course not bound by an agreement

between parties. It remains the responsibility of the Court to be satisfied that legislation is indeed inconsistent with the Constitution and thus invalid, before declaring it so and that the remedy proposed is in accordance with the Court's constitutional mandate and established jurisprudence.

[17] Sections 10 to 10E of the Post Office Act, the relevant provisions dealing with the administrative and financial matters of

the Fund, are clearly unconstitutional. Because of the omission of the "clean break" principle there is a differentiation

between the payment of divorced spouses' interests regulated by the Pension Funds Act and the Government Employees Pension Law Amendment Act on one hand, and the payment of divorced spouses' interest governed by the Post Office Act on the other. The differentiation is irrational as it has no basis. It does not meet the requirement of equality before the law and equal protection and benefit of the law contained in section 9(1) of the Constitution.¹⁰ The respondents furthermore did not submit that the legislation contains a reasonable and justifiable limitation¹¹ of the right protected in section 9(1) and could hardly do so. Therefore, the omission of the "clean break" principle

from sections 10 to 10E of the Post Office Act renders those provisions invalid to the extent of this inequality.

[18] The declaration of invalidity is suspended for eight months for the Legislature to cure the defect. If the unconstitutionality is not remedied within this period, the provision in the order of this Court as stated below will be read into the Post Office Act. Parliament and the Executive should carefully consider the consequences of failing to remedy this constitutional defect, especially how the rather extensive reading-in will affect the structure and application of the relevant legislation. This must be done, even though counsel for the respondents – when prompted by the Chief Justice during the presentation of oral submissions – gave the assurance that his clients were comfortable with the reading-in as well as the period of suspension.¹²

[19] The applicants applied for condonation for the late filing of the record. The application was not opposed. The delay was adequately

explained. No prejudice was suffered. Condonation should be granted.

[20] The direct access application and the relief sought, and agreed to by the parties, should be granted.

[21] The following order is made:

Condonation for the late filing of the record is granted. The application for direct access is granted. The omission from sections 10 to 10E of the Post Office Act 44 of 1958 of a provision for the former spouse of a member of the Post Office Retirement Fund, who has been awarded a portion of that member's pension interest in that Fund, pursuant to section 7(8) of the Divorce Act 70 of 1979, to be paid that portion on divorce or dissolution of customary marriage (the "clean break" principle), is declared to be inconsistent with section 9(1) of the Constitution and therefore sections 10 to 10E of the Post Office Act 44 of 1958 are invalid to the extent of the inconsistency. The declaration of invalidity is suspended for eight months to enable Parliament to cure the defect.

If the constitutional defect is not remedied by 7 November 2013, section 24A of the Government Employees Pension Law, Proclamation 21 of 1996, shall be read into the Post Office Act 44 of 1958 as section 10F thereof and will take effect. The wording to be read in as section 10F is annexed to this order, as "A". The second respondent is ordered to pay the applicants' costs in this Court.

ANNEXURE "A"

10F Payment of pension interest upon divorce or dissolution of customary marriage

- (1) The Board shall direct the Fund to reduce a member's pension interest by any amount assigned from the member's pension interest to the member's former spouse in terms of a decree of divorce granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), or a decree for the dissolution of a customary marriage.
- (2) (a) Subject to paragraph (j), for purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of a member's pension interest assigned to the member's former spouse in terms of a decree of divorce or a 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 the decree for the dissolution of a customary marriage is granted.
- (b) The amount of the member's pension interest in the Fund shall be determined and the amount of the member's pension

interest that is assigned to the former spouse shall be calculated by the Fund in accordance with the rules as at the date of the decree of divorce or the decree for the dissolution of a customary marriage.

- (c) Prior to determining the amount of the member's pension interest that is assigned to the former spouse, the amount of the member's pension interest referred to in paragraph
- (b) shall first be reduced in accordance with the rules by any amount of the member's pension interest which, in a previous divorce or a previous dissolution of a customary marriage, was paid

over or awarded to another party.

- (d) The amount of any pension benefit that is subsequently payable to the member in terms of the rules will be reduced by the equivalent of the amount of the share of the pension interest of the member which—
 - (i) was deemed to accrue to the member as a benefit in advance of the benefit ordinarily payable in terms of the rules; and
 - (ii) was assigned to the member's former spouse, less the amount of any additional voluntary contributions, if any, paid by the member to the Fund from time to time, and accumulated over the period from the date on which payment to the former spouse or transfer to the approved fund as referred to in paragraph
- (e) took place to the date on which the member first became entitled to a part or the whole of the balance of the benefit, with interest as the Board from time to time deems appropriate.
- (e) The Fund shall, within 45 days of the submission of the court order by the former spouse of a member, request the former spouse to elect whether the amount to be deducted must be—
 - (i) paid directly to the former spouse; or
 - (ii) transferred to an approved retirement fund on behalf of the former spouse.
- (f) The former spouse shall, within 120 days of being requested to make a choice—
 - (i) inform the Fund of the manner in which the amount referred to in paragraph
 - (e) must be dealt with; and
 - (ii) if the former spouse chooses that the amount must be paid to the former spouse directly, provide the Fund with the details that are necessary to effect the payment; or
 - (iii) if the former spouse chooses that the amount must be transferred to an approved pension fund on his or her behalf, providethe Fund with the details of that approved retirement fund.
- (g) The Fund shall pay or transfer the amount within 60 days of being informed of the manner in which the amount shall be dealt with in accordance with the former spouse's choice.
- (h) In the event that the former spouse fails to make a choice or identify the approved retirement fund to which the amount should be transferred within the period referred to in paragraph (f), the Fund shall pay the amount directly to the former spouse within 30 days of the expiry of that period.

- (i) Despite paragraph (h), in the event that the Fund cannot reasonably ascertain the manner in which the payment to the former spouse shall be effected, the Fund shall retain the amount plus interest as determined by the Board in the Fund, until such time as details of the manner in which that payment shall be effected is made available to the Fund by the member, the former spouse or any other person whom the Fund is satisfied has the necessary authority and capacity to instruct the Fund in that respect.
- (j) Any portion of a member's pension interest assigned to a former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage granted prior to the enactment of this subsection shall, for purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, section 7(8)(a) of the Divorce Act, 1979 (Act

No. 70 of 1979), be deemed to have accrued to the member on the date of enactment of this subsection, and must be paid or transferred

in accordance with paragraphs

(a) to (i).

For the Applicants: Advocate I Goodman instructed by the Women's Legal Centre.

For the First and Second Respondents: Advocate P J Pretorius SC and Advocate S Yacoob instructed by Dunster & Associates and the State Attorney.

1Section 9(1) states: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

224 of 1956.

3Proclamation 21 of 1996, as recently amended by the Government Employees Pension Law Amendment Act 19 of 2011.

444 of 1958.

5Government Notice 1107 in Government Gazette 28228 of 2005.

670 of 1979.

7The Minister communicated these proposed amendments to the Deputy President, who as the Leader of Government Business proposes

amendments to Parliament. The amendments, as the South African Post Office SOC Ltd Amendment Bill (Bill), were placed on the 2012 Legislative Programme. The Bill was to be submitted to Cabinet on 13 June 2012 and to Parliament in the fourth quarter of

2012. However, the Bill was only published for comment on 31 October 2012, the closing date for comments being 12 December 2012.

8 [2011] 4 All SA 280 (WCC) at para 45.

9 *Wiese v Government Employees Pension Fund and Others* [2012] ZACC 5; 2012 (6) BCLR 599 (CC). Only an order as to costs was made.

10 See *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 42 and *Prinsloo v Van der Linde and Another* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at paras 25-6. These cases were decided under section 8(1) of the interim Constitution which is substantially similar to section 9(1) of the Constitution.

11 Section 36(1) provides for the limitation of rights and states: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.”

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- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

12 This Court has read in language to cure constitutional defects in legislation on several occasions. See for example *Minister of Home Affairs and Another v Fourie and Another* (Doctors for Life International and Others, *Amici Curiae*); *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*

[2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) and *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC).

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