

SOUTH AFRICA / JUDGMENT

Z.M (born R) v M.M.M (CA129/15) [2017] ZAECHGC 65 (30 May 2017)

[2017] ZAECHGC 65

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, JE Smith

CASE / FILE NUMBER

CA129/15

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

Case No: CA 129/15

Z. M. (born R.)

Appellant

and

M. M. M.

Respondent

JUDGMENT

MALUSI J

- [1] The appellant applied for an amendment of an order by the Regional Court, sitting in King Williams Town to specifically provide for the respondent's pension interest. The application, which was opposed, was dismissed with costs. The appellant now appeals against that order. The appeal is not opposed.
- [2] For a better appreciation of the issues it is necessary that a brief background of the facts be provided. The facts are largely common cause.

[3] The appellant and the respondent were formerly married to each other in community of property. The marriage was dissolved by an order of the court a quo on 4 February 2010. The decree of divorce provided for the division of the joint estate, primary residence of the party's

minor children was awarded to the appellant and the respondent was allowed reasonable contact.

[4] In the court a quo the appellant brought an application to claim one half of the respondent's pension interest with the Government Employees

Pension Fund (GEPPF) of which the respondent is a member as he was at the time of the divorce. She had received legal advice that the respondent's pension interest with the GEPPF formed part of their joint estate. The GEPPF was not prepared to pay the half share of the pension interest without a specific order to that effect in the decree of divorce. The application was brought four and half years after the decree was issued.

[5] The respondent resisted the application on two basis:

- (a) He alleged that prior to the decree being issued, the appellant had agreed not to claim her half share in his pension interest. In return the respondent would continue paying premiums on her life insurance policy. Also, the parties foresaw that the respondent would later be the primary caregiver for the parties minor children and be solely responsible for their maintenance.
 - (b) The order sought was incompetent as the appellant had failed to claim at the time the decree was granted.
- [6] The regional magistrate took note of the conflicting High Court judgments on the issue. He made a finding that as a matter of fact the joint estate had been divided. He held that a claim for pension interest cannot be indefinite. He dismissed the claim with costs.

[7] Before us, Ms Watt who appears for the appellant submitted that the court a quo erred as there was no evidence by the respondent that the joint estate had in fact been divided. She argued that there is no merit in the defence raised by the respondent.

[8] The application concerns section 7(7) and (8) of the Divorce Act 70 of 1979. The aforesaid subsections provide as follows:

“(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 part of his assets.

- (b) The amount so seemed 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 purpose of an agreement contemplated in subsection (1) was accounted in favour of another party.
- (8) Notwithstanding the provisions of any other law or of the rules 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”.
- [9] The crisp issue for decision is whether the appellant is entitled to a fifty percent share of the respondent's pension interest, calculated as at the date of divorce.
- [10] There had been a divergence of views in the various divisions of the High Court on the issue. This has since been settled by a judgment of the Supreme Court of Appeal which has aptly been described as erudite with a scholarly exposition of the law. In *GN v JN* it was held that section 7(7)(a) vested in the joint estate the pension interest of the member spouse for the purposes of determining the patrimonial benefits where the parties were married in community of property.[1] The provision was of a peremptory nature.
- [11] It is trite that an appeal court has a duty to overrule a conclusion of the court a quo on a question of fact when it is convinced that the conclusion to which the latter has come is wrong.[2]
- [12] The reason for the regional magistrate to dismiss the application was that he held the view that there had been division of the joint estate as matter of fact. He went on to state that ‘the claim against a party's pension interest cannot be indefinite’.
- [13] Despite a diligent examination of the record I found no evidence to support the regional magistrate's view and conclusion.

There is paucity of information on the record whether or not the joint estate, as a matter of fact, has been divided. The little information available indicates that there has not been division. The respondent makes various averments regarding the precarious financial position he finds himself due to the divorce. If there had been division, these debts or liabilities would have formed part of the joint estate and equitably shared by the parties. It is manifest that the regional magistrate was wrong.

- [14] Turning to the defence proffered by the respondent I agree with Ms Watt that any agreement between the parties prior to the dissolution of the marriage by way of a decree is unenforceable. Such an agreement is superseded by the court order. On the facts of this matter, the agreement has not even been proven. According to the respondent the agreement was conditional upon him paying insurance premiums for the appellant. He has neither averred that he has paid the premiums nor asserted that the insurance policy is valid.
- [15] The contention by the respondent that the claim for the pension interest ought to have been made at the time the decree was granted is without merit. It is now settled law that a party may claim from the other party's pension interest even after the decree has been issued provided division of the joint estate has not yet occurred.[3]
- [16] I am satisfied that the appeal should succeed. I can find no reason why the costs should not be awarded to the appellant.

The respondent ought to have abandoned the judgment if he held the view that it was indefensible. I intend to grant an order as proposed in the draft order

[17] In the result the following order is made:

1. The appeal is upheld, with costs.
2. The order of the Court a quo is set aside and in its place the following order is issued:
 - 2.1 The order issued by the Southern Divorce Court, under Case No. 351/2010, on 4 February 2010 is amended to incorporate the following:
 - 2.1.1 The plaintiff is entitled to 50% (fifty percent) of the value of the defendant's pension interest held with the Government Employees Pension Fund, under membership number [9...], as at date of divorce;
 - 2.1.2 The relevant endorsement shall be effected against the defendant's pension interest held with the Government Employees Pension Fund, under membership number [9...], and 50% (fifty percent) of the value of the defendant's pension fund as at date of divorce shall be payable immediately upon the Fund's administrators becoming aware of this order, or as soon thereafter as reasonably possible.
 - 2.2 The respondent shall pay the costs of the application

T MALUSI

Judge of the High Court

Smith J: I agree.

JE SMITH

Counsel for Appellant:

Adv KL Watt

Instructed by:

Wheeldon Rushmere & Cole, Grahamstown

For Respondent:

No appearance

Date heard:

26 May 2017

Date delivered:

30 May 2017

[1] GN v JN 2017(1) SA 342 at paragraph [26].

[2] Mine Workers Union v Brodrick 1948(4) SA 959(A) at 970.

[3] Fritz v Funds at Work Umbrellas Pension Fund 2013(4) SA 492 at paragraph 21; GN supra at paragraph 31.

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