THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 600/2015

In the matter between:

GALEFELE HILDA NDABA **APPELLANT**

and

JAMES NDABA **RESPONDENT**

Neutral citation:	*Ndaba v Ndaba* (600/2015) [2016] ZASCA 162 (4 November 2016)
Coram:	Mpati AP, Seriti, Petse and Swain JJA and Makgoka AJA
Heard:	23 August 2016
Delivered:	4 November 2016

Summary: Marriage ─ Divorce ─ parties married in community of property ─ pension interest ─ entitlement of non-member spouse under ss 7(7)*(a)* and 7(8)*(a)* of Divorce Act 70 of 1979 ─ pension interest of member spouse as at date of divorce is by operation of law part of the joint estate for the purpose of determining the parties' patrimonial benefits ─ no order required in terms of s 7(7)*(a)*.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Kgomo J sitting as court of first instance):

1 The appeal is upheld with costs.

2 The order of the court below is set aside and in its place the following order is substituted:

'1 Mr Phillip Jordaan of Divorce Settlement Services, Pretoria is appointed as Liquidator of the joint estate of the applicant and the respondent with the powers and obligations set out in annexure A to this judgment.

2 It is declared that the applicant is entitled to an amount equal to 50 per cent of the respondent's nett pension interest in the Government Employees Pension Fund Scheme calculated as at 25 May 2012.

3 It is declared that the respondent is entitled to an amount equal to 50 per cent of the applicant's nett pension interest in the Government Employees Pension Fund Scheme calculated as at 25 May 2012.

4 The respondent shall pay the costs of the application.'

JUDGMENT

Petse JA (Mpati AP and Swain JA concurring):

[1] The primary issue in this appeal concerns the proper interpretation of s 7(7) and (8) of the Divorce Act 70 of 1979 (the Act). The subsidiary issue concerns the legal effect of the terms of a clause relating to the division of the joint estate contained in the settlement agreement concluded by the parties and incorporated in the divorce order granted in the Regional Court for the North West Regional Division, Temba (the trial court) on 25 May 2012. These issues arise against the following backdrop.

[2] The appellant, Ms Galefele Hilda Ndaba, and the respondent, Mr James Ndaba, were formerly married in community of property. On 25 May 2012 their marriage was dissolved by the trial court at the suit of the appellant. The divorce order granted by the

trial court incorporated a provision that '. . . the deed of the settlement between the parties . . . [annexed thereto] is made an order of the court.' The parties' deed of settlement in turn provided, inter alia, that their joint estate would be divided equally between them. The appellant asserted that they incorporated this clause into their settlement agreement because at that stage they could not agree on the method of the division of the joint estate.

[3] On 15 April 2013 the appellant's attorneys wrote a letter to the respondent inviting him to make proposals in relation to the division of the joint estate. They indicated that if no proposals were forthcoming the appellant would institute legal proceedings in which a determination of that dispute would be sought. In the event, no response was received from the respondent. Consequently, on 26 June 2013 the appellant, as applicant, instituted legal proceedings on notice of motion against the respondent in the Gauteng Division of the High Court, Pretoria in which, in essence, she sought an order for, inter alia, the appointment of a liquidator. She also sought a declarator that she and the respondent were entitled to an amount equal to 50 per cent of each other's pension interest. In addition, she sought an order directing each pension fund to make an endorsement in its records that a portion of the pension interest of the member spouse, as at the date of divorce, shall be payable to the non-member spouse when the pension benefits accrued.

[4] Whilst the respondent did not oppose the appointment of the liquidator, he, however, resisted the remainder of the relief sought. In his answering affidavit, the respondent, inter alia, said the following:

'I deny that either my or the applicant's pension interest form part of the assets to be divided between the parties. Our respective pension interests did not form part of the applicant's claim when she instituted divorce proceedings, it did not form part of the settlement agreement, and no order was granted in terms of which it was deemed to be part of the assets in the joint estate in accordance with section 7(7) and 7(8) of the Divorce Act 70 of 1979.

. . .

These policies include my retirement annuity fund, which also falls within the definition of "pension interest" and is similarly excluded from the joint estate, because of the fact that our respective pension interests did not form part of the applicant's claim when she instituted divorce proceedings, it did not form part of the settlement agreement, and no order was granted

in terms of which it was deemed to be part of the assets in the joint estate in accordance with section 7(7) and 7(8) of the Divorce Act 70 of 1979.'

[5] Thus, the respondent's answer to the appellant's claim was, in substance, threefold. First, he asserted that the appellant had unequivocally renounced her claim in relation to the pension interest in her prayers in the divorce action. Second, that the pension interest nowhere featured in their settlement agreement. Third, that the divorce court which granted the decree of divorce had not made an order deeming the pension interest as part of the joint estate, as contemplated in s 7(7)*(a)* and (8) of the Act. However, it was not contested that the joint estate had still not been divided between them.

[6] The application came before Kgomo J who, after considering the provisions of the Act and reviewing certain judgments dealing with the interpretation of s 7(7)*(a)* and (8) of the Act, dismissed it with costs. The dismissal of the application in relation to the appointment of a liquidator appears to have occurred per *incuriam* as the court a quo had itself noted that that aspect was uncontentious. In essence, the court a quo approached the matter on the following basis:

- It first asked itself two questions; namely: (i) whether it could grant an order declaring the parties' respective pension interests to be part of the joint estate long after the dissolution of the marriage when no such order was made by the court granting the decree of divorce; and (ii) whether it was open to it to vary the divorce order by supplementing the blanket order relating to the division of the joint estate by inclusion of the parties' respective pension interest.
- After reviewing several cases[1] of various Divisions of the High Court, it held that the Act contemplates that any order in terms of s 7(7)*(a)* and (8) can be granted only by the court granting the decree of divorce. Thus, s 7(7)*(a)* and (8) do not avail a party who seeks to invoke them after the dissolution of the marriage.
- It concluded that absent a court order by the divorce court declaring the pension interest of the member spouse as part of the joint estate, such pension interest did not form part of the joint estate.

[1] *Sempapelele v Sempapelele & another* 2001 (2) SA 306 (O); *YG v Executor, Estate Late* CGM 2013 (4) SA 387 (WCC); *Maharaj v Maharaj & others* 2002 (2) SA 648 (D); *Fritz v Fundsatwork Umbrella Pension Fund & others* 2013 (4) SA 492 (ECP).

- That, in any event, the parties' settlement agreement in the divorce court was silent in relation to their respective pension interests.

[7] Aggrieved by the dismissal of her application, the appellant now appeals to this court with the leave of the court a quo.

[8] Section 7(7) and (8) in their material parts read:

'(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 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 party.

(c) . . .

(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 receipt of such notification;

(b) . . . .'

[9] The concept of 'pension interest' which is central to s 7(7) and (8) is, in turn, defined in s 1(1) of the Act as follows:

'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;

(b) . . . .'

[10] As to the nature of the pension interest, this court in *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) SA 373 (SCA) said the following (para 18):
'[A]s indicated above, s 7(7)*(a)* of the Divorce Act 'deems' a member spouse's "pension interest" to be an asset in his or her estate for purposes of the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. "Pension interest" is narrowly defined and simply establishes a method of ascertaining the value of the "interest" of the member of the pension or retirement annuity fund concerned as accumulated up to the date of the divorce. In the words of the South African Law Commission:
"A pension interest is not a real asset that is open to division. It is the value that, on the date of divorce, is placed on the interest that a party to those proceedings has in the pension benefits that will accrue to him or her as a member of a pension fund or retirement annuity fund at a certain future date or event in accordance with the rules of the particular fund. The value of the interest is calculated according to a fixed formula and the amount determined in this manner is *deemed* to be an asset of the party concerned. What we are dealing with here is a notional asset that is added to all the other assets of the party concerned in order to determine the extent of the other party's claim to a part of the first-mentioned party's assets."' (Footnotes omitted.)

[11] As indicated, the real issue on appeal is therefore whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate. As to a pension fund's statutory competence to make deductions from a member's pension benefits, this court in *Eskom Pension and Provident Fund v Krugel & another* (689/2010) [2011] ZASCA 96 [2011] 4 All SA 1 (SCA) said the following (para 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 37D and 37A 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 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."' (Footnotes omitted.)

[12] In the context of a divorce action, it is s 37D(1)*(d)*(i) of the Pension Funds Act 24 of 1956 which is of relevance. It authorises a registered pension fund to:

'(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 spouse in terms of a decree granted under section 7 (8) (*a*) of the Divorce Act, 1979 (Act 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; and . . .'

[13] Section 21(1) of the Government Employees Pension Law 1996 which came into operation on 1 May 1996 is to the same effect. The section reads:

'Subject to section 24A, no benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in . . . section 7(8) of the Divorce Act, 1979 (Act 70 of 1979), be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.'

[14] There are several judgments[2] of the various Divisions of the High Court in which the import of the provisions of s7(7)*(a)* and (8) of the Act has been considered. The interpretation placed on these provisions in those judgments has been discordant. However, I do not propose to analyse and discuss each of those decisions so as not to overburden this judgment.

[15] In *Sempapalele*, the court dealt with a claim by a former spouse for the payment of a portion of the pension interest of the member spouse following the dissolution of their marriage by divorce years earlier. The parties had concluded a settlement agreement — made an order of court — in terms of which their joint estate was to be

[2] *Sempapelele v Sempapelele & another* 2001 (2) SA 306 (O); *YG v Executor, Estate Late CGM* 2013 (4) SA 387 (WCC); *Maharaj v Maharaj & others* 2002 (2) SA 648 (D); *Fritz v Fundsatwork Umbrella Pension Fund & others* 2013 (4) SA 492 (ECP); *Elesang v PPC Lime Ltd & others* 2007 (6) SA 328 (NC); *Kotze v Kotze & another* [2013] JOL 30037 (WCC); *Macallister v Macallister* [2013] JOL 30404 (KZD); *Motsetse v Motsetse* [2015] 2 All SA 475 (FB); *M v M* (LPD) unreported case no 18/15 of June 2016.

divided between them. The former wife asserted that she was entitled to a 50 per cent share of the former husband's pension benefits paid out to him, more than a year after their divorce and to that end she instituted an action claiming, inter alia, a share of the former husband's pension benefit. Although Musi J ultimately dismissed the action on the simple basis that the plaintiff had failed to prove the value of her former husband's pension interest as at the date of divorce, the learned judge observed that (at 312G-H):

'. . . the applicant failed (for whatever reason) to obtain at the hearing of the divorce matter a Court order awarding her a share in the respondent's pension interest in terms of s 7 of the Divorce Act. She cannot now get such an order.'

[16] In *YG v Executor, Estate Late CGM* (which pertained to a claim for redistribution of assets in terms of s 7(3) of the Act), Gangen AJ found the reasoning in *Sempapalele* instructive. He expressed the view that there was a common thread running through s 7 of the Act, to the effect that any relief in terms thereof can only be granted by the court granting the decree of divorce. The learned judge said (para 15):

'It is also clear from a reading of the subsections of s 7 that they are interrelated and cannot be treated in isolation of one another.'

Later he continued (para 17):

'It is accordingly evident that only a court granting a divorce order may grant the ancillary relief.'

[17] In *Maharaj* the court was faced with a situation similar to that in *Sempapalele* but reached a contrary conclusion. In the course of his consideration of s 7(7)*(a)*, Magid J said the following (at 651C-E):

'That section was presumably inserted in the Act in order to rectify what may have been regarded as an injustice to the spouse who did not have the pension interest. It states quite unequivocally that a pension interest is deemed to be part of the assets of a party "in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled". The phrase "patrimonial benefits" is not qualified by reference to the other subsections of s 7 of the Act. It applies in my judgment, with equal force to a marriage in community of property.

. . .

In my judgment, therefore, when the joint estate of spouses married in community of property is to be divided it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one of them as at the date of divorce.'

Later he continued (652B):

'It therefore seems to be common cause that the joint estate as it existed at the date of the divorce has never actually been divided . . .'

[18] In *Fritz v Fundsatwork Umbrella Pension Fund*, a case where similarly no order had been made pursuant to s 7(7) of the Act when the decree of divorce was granted, Goosen J expressed a preference for *Maharaj* as opposed to *Sempapalele*. After examining certain judgments in relation to court orders for division of a joint estate, the learned judge said (para 23):

'This, in my view, brings the process of giving effect to an order of division of the joint estate, by way of a subsequent appointment of a receiver or by way of the resolution of a dispute in relation to the division by the court, squarely within the ambit of s 7(7) of the Divorce Act, which speaks of determining the patrimonial benefits in a divorce action. The definition of "divorce action" which refers to an action by which a decree of divorce *or other relief in connection therewith* is applied for, is broad enough to cover proceedings whereby the court exercises its supervisory jurisdiction in relation to the division of a joint estate in the absence of agreement between the parties.'

[19] But, as the joint estate had already been divided pursuant to the decree of divorce, the court in *Fritz* concluded that 'an order the effect of which is to "deem" a pension interest to be part of the joint estate' would not be appropriate.

[20] The import of s 7(7) and (8) of the Act also arose pertinently in *Kotze*, a judgment of the Full Court of the Western Cape High Court. It bears mentioning that *Kotze* (like *Fritz*) differs from the present case in one material respect, namely that the division of the parties' joint estate pursuant to the order granted by the court granting the divorce had already occurred. There, the former wife had sought an order declaring that she was entitled to 50 per cent of the pension benefit paid to the former husband several years after the divorce. Her claim in the court of first instance failed on the ground that there was an irresoluble dispute of fact on the papers, which she ought to have foreseen.

[21] On appeal, the Full Court considered the issue to be one that fell foursquare within the purview of s 7(7) and (8) of the Act. Saldanha J, writing for the Full Court, said the following (paras 30-31):

'[30] As indicated, Mr *Studti* was strongly of the view that if the divorce order is found as not having excluded the pension benefit (and all the other movables) it should be regarded as ambiguous and in such event the principles of interpretation applied thereto. Mr *Burger* however submitted that there was nothing ambiguous about the court order as it was clear and inasmuch as the issue of the pension interest arose by virtue of section 7(7)(a) it did not impact on a interpretation of the divorce order. Moreover, the first respondent himself in his opposing papers in the court *a quo* claimed that the meaning of the court order was clear and so too did Louw J in fact find that the order was clear and unambiguous. I share that view and it is therefore not necessary to apply the rules of construction or interpretation with regard to the divorce order inasmuch as its meaning is clear and deals very specifically only with the assets in the joint estate referred to therein.

[31] It is apparent from the judgment of the court *a quo* that Louw J did not consider the relief that the appellant sought in paragraph 2 but rather dealt substantively with whether the appellant had made out a case for the variation of the court order. Moreover, it does not appear that it was argued before the court *a quo* that the appellant was entitled to the relief under Prayer 2 which, in my view, she was entitled to, without the need for a variation of the divorce order.'

And the learned judge concluded (para 32):

'[32] I am of the view that where parties who were married to each other in community of property in subsequent divorce proceedings do not deal with a pension or provident fund interest which either or both of them may have had in separate pension or provident funds either by way of a settlement agreement or by an order of forfeiture, each of them nonetheless remain entitled to a share in the pension or provident fund to which the other spouse belonged to and such share is to be determined as at the date of divorce by virtue of the provisions of section 7(7)(a) of the Divorce Act 70 of 1979.'

[22] It would appear that the only assets of real value comprising the joint estate in *Kotze* were two immovable properties. The parties had agreed that the wife would retain the one property whilst the husband would retain the other. The divorce court made an order incorporating the parties' settlement agreement. As indicated, when the wife discovered that the husband had received a substantial amount from his pension fund, that had accrued to him long after the division of the joint estate (pursuant to the parties' agreement) had occurred, she applied to the court of first instance, for an order in terms of s 7(7) and (8). As already mentioned, the court of first instance dismissed the application on the grounds that there was an irresoluble dispute of fact on the papers, which should have been foreseen. The Full Court, as pointed out above, found that

notwithstanding the fact that the division of the joint estate had already been completed, the wife was entitled to a share of the pension benefit which had accrued to the husband. This share fell to be determined as at the date of divorce, in terms of s 7(7)*(a)* of the Act. To the extent that the Full Court in *Kotze* concluded that it was competent to grant an order in terms of s 7(7)*(a)* of the Act after the parties' joint estate had already been divided in accordance with the order granting the divorce, it erred.

[23] The judgment of the Full Court in *Kotze* has been criticised by Mr Johan Davey in an article titled 'K v K and Another ─ a critique' published in *De Rebus* of September 2013 (at 26-28). The writer opines that even though a pension interest is deemed to be part of the joint estate for the purposes of determining the patrimonial benefits of a marriage to which parties to a marriage in community of property are entitled, a non-member spouse becomes entitled to such share only if the court granting the decree of divorce makes such a declaration in terms of s 7(8)*(a)*.

[24] Relying on the authority of *Eskom Pension and Provident Fund* which is to the effect that a non-member spouse's entitlement to receive benefits from a pension fund of the member spouse in terms of s 37D(1)*(d)*(i) of the Pension Funds Act, 24 of 1956, derives from the provisions of s 7(7) and s 7(8) of the Act, Mr Johan Davey then contends that even though a member spouse's pension interest is deemed to form part of the joint estate for the purposes of s 7(7)*(a)*, a non-member spouse becomes entitled to a share thereof only when 'it is assigned to him or her in terms of s 7(8)'.

[25] Accordingly, the writer notes that, absent a court order in terms of s 7(8), the non-member spouse effectively forfeits his or her entitlement to a share in the pension interest of the member spouse. I do not agree with these sentiments for the following reasons. First, s 7(7)*(a)* is self-contained and not made subject to s 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce. The entitlement of the non-member spouse to a share of the member spouse's pension interest as defined in the Act is not dependant on s 7(8). To my mind, it would be inimical to the scheme and purpose of s 7(7)*(a)* if it only applies if the court granting a divorce makes a declaration that in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party

shall be deemed to be part of his or her assets. The grant of such a declaration would amount to no more than simply echoing what s 7(7)*(a)* decrees. For the same reasons it was not necessary for the parties in this case, to mention in their settlement agreement what was obvious, namely that their respective pension interests were part of the joint assets which they had agreed, would be shared equally between them.

[26] In my judgment, by inserting s 7(7)*(a)* in the Act the legislature intended to enhance the patrimonial benefits of the non-member spouse over that which, prior to its insertion, had been available under the common law. The language of s 7(7)*(a)* is clear and unequivocal. It vests in the joint estate the pension interest of the member spouse for the purposes of determining the patrimonial benefits, to which the parties are entitled as at the date of their divorce.[3] Most significantly, the legislature's choice of the word 'shall' coupled with the word 'deemed' in s 7(7)*(a)* is indicative of the peremptory nature of this provision. The section creates a fiction that a pension interest of a party becomes an integral part of the joint estate upon divorce which is to be shared between the parties. Van Niekerk puts it thus:[4]

'[W]here the parties are married in community of property, the value of the pension interest is added to the value of the other assets that fall in the joint estate for purposes of the division of the estate.'

[27] Section 7(8), on the other hand, creates a mechanism in terms of which the Pension Fund of the member spouse is statutorily bound to effect payment of the portion of the pension interest (as at the date of 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.[5] The non-member spouse is thereby relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest with all its attendant risks.[6] 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):

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[3] See further in this regard: Jacqueline Heaton ed (2014), *The Law of Divorce and Dissolution of Life Partnerships in South Africa* at 74.
[4] P A van Niekerk, *A Practical Guide to Patrimonial Litigation in Divorce Actions*, issue 17 September 2015 at 7.2.4.1.
[5] See further the discussion by P A van Niekerk op cit para 7.2.4.1.
[6] Jacqueline Heaton op cit at 77.

'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. . . .'

[28] The cases that espouse the proposition that for the pension interest of a member's spouse to form part of the joint estate upon divorce, it is necessary that it be claimed by the non-member spouse in his or her summons or counter-claim, have been criticised.[7] For the reasons articulated above, those criticisms, in my view, are justified.

[29] In the respondent's written heads of argument, it was contended that only the court granting the divorce order may grant relief under s 7(7)*(a)*. And that in the absence of such an order the non-member spouse could not at a later stage seek an order under s 7(7)*(a)* or s 7(8). For this submission respondent's counsel placed much store in the decision of this court in *Schutte v Schutte* 1986 (1) SA 872 (A) at 882C-E. In relation to maintenance in terms of s 7(1) of the Act, this court said it was only the court granting a divorce that could make an order with regard to the payment of maintenance by the one party to the other. That decision, however, is distinguishable and did not deal with the clear wording of s 7(7)*(a)*.

[30] Appreciating the weakness inherent in the respondent's contention, before us counsel for the respondent adopted a different approach accepting that the pension interest of either party in this case formed part of their joint estate. It was nevertheless contended that a party seeking an order for the division of the pension interest of the other party ─ which is what the appellant sought in the court a quo ─ must still obtain an order in terms of s 7(8) of the Act from the court granting the divorce. For the reasons set out above this submission is without foundation. A further submission was made however, that the appellant's belated application in the court a quo was doomed to fail as no such order can be granted post the grant of the divorce order, even at the instance of a liquidator. It is, in my view, not necessary to decide this point as counsel for the appellant accepted that it would not be competent for this court to decide this

[7] See, for example, Merike Pienaar Does a non-member spouse have a claim on pension interest (December 2015) *De Rebus* at 38-39; M C Marumoagae A non-member spouse's entitlement to the member's pension interest (2014) 17(6) *Potchefstroom Electronics Law Journal* 2488 at 2509.

issue for the first time on appeal when no application had been made in the court that granted the decree of divorce for such relief.[8]

[31] In the result those decisions which held that if there is no reference in the divorce order of parties married in community of property to a member spouse's pension interest, the non-member spouse is precluded in perpetuity from benefitting from such pension interest as part of his or her share of the joint estate, were wrongly decided. It follows that the liquidator will be justified in regarding the pension interest of either party as part of the assets of their joint estate which has yet to be divided between them.

[32] It remains to say that I have had the benefit of reading the judgment of my colleague, Makgoka AJA. I have no quarrel with the additional facts set out in my colleague's judgment. My colleague and I agree on the basic premise that the fate of this appeal in relation to the parties' pension interests hinges on the interpretation of their settlement agreement. But we differ fundamentally on the direction to which the interpretation process should lead us. I regret that I cannot subscribe to the process of reasoning and the conclusion reached by my colleague. I have difficulty with the interpretation placed on the parties' settlement agreement in relation to the division of their joint estate. My colleague says that because the relevant clause is headed 'Immovables and Movables' this means that the body of the clause which reads: 'The joint estate shall equally be divided between the parties' must be taken to mean that only immovables and movables are encompassed thereby and nothing else. And that the concept of 'immovables and movables' does not include the pension interest of a member spouse. In my view, there is a glaring difficulty with this approach.

[33] First, as already indicated (para 10), this court in *Old Mutual Life Assurance* approved of the description of a pension interest in the South African Law Commission's Reports dealing with the division of pension benefits on divorce in Project 41 (March 1995) and the sharing of pension benefits in Project 112 (June 1999), namely, that a 'pension interest' is a notional asset which 'simply establishes

[8] See in this regard s 168(3)*(b)*(i) and (ii) of the Constitution which provides that the Supreme Court of Appeal may decide only appeals or issues connected with appeals. The wording of s 7(8)*(a)* would, however, seem to restrict the grant of such an order to the 'court granting a decree of divorce'. But for the present purposes it is unnecessary to express a definite conclusion on this question.

a method of ascertaining the value of the "interest" of the member of the pension or retirement annuity fund as accumulated up to the date of the divorce'. This notional asset 'is added to all the other assets of the party concerned in order to determine the extent of the other party's claim to a part of the first-mentioned party's assets'. Second, whilst it is correct that the heading and the provisions of a contract should be read together where the heading does not conflict with the body of the contract, it is trite that where there is conflict between the heading and the body of the contract the latter prevails. But here, as my colleague points out, there is no conflict between the heading and the body of the relevant clause. However, sight must not be lost of the fact that the parties in this case were married in community of property. Consequently, one of the invariable consequences of such a marriage is that, subject to a few exceptions not here relevant, the spouses became co-owners in undivided and indivisible half-shares of all the assets acquired during the subsistence of their marriage. And, absent a forfeiture of benefits under s 9(1) of the Act or an express agreement between the parties to the contrary, each spouse is entitled to a half-share of the joint estate ─ whatever it entails.

[34] The joint estate in this case must necessarily include the pension interest of either party as contemplated in s 7(7)*(a)* of the Act. Hence the heading to the clause, such as it is, cannot be taken to mean that the pension interest of each spouse is excluded from the assets which make up the joint estate. It is manifest from the language of the clause, which must be 'the inevitable point of departure, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'[9], that the clause relating to the equal division of the joint estate constituted the so-called blanket division. Indeed both the heading and the language of the body of the clause concerned, read together, do not support the construction and hence the limitation placed on it by my colleague. And the settlement agreement is not susceptible to an interpretation that the parties' pension interests were excluded from its reach. Quite the contrary. As to the background to the preparation and production of the settlement agreement, great store is placed in the assumption that the settlement agreement was drafted by the respondent's attorneys without any input from the appellant. From this, it is

[9] *Natal Joint Municipality Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 SCA para 18.

concluded that because the respondent's attorneys knew that the appellant had renounced her entitlement to the pension interest in her combined summons, the respondent could not have been so benevolent as to allow the appellant to share in his pension interest. In my view, there is no warrant for this conclusion. First, it is belied by the averment in the respondent's answering affidavit that the parties' pension interest 'did not form part of the settlement negotiations' which implies that the conclusion of the settlement agreement was preceded by negotiations. Second, it is based on conjecture as there is no evidence on record as to what the parties' settlement negotiations entailed prior to the grant of the divorce order.

[35] In any event, there is a more fundamental reason why the pension interests of the parties must, on the facts of this case, be an integral part of their joint estate. Central to the reasoning in my colleague's judgment is, in my view, the notion that a pension interest is neither immovable nor movable. And that because the clause under consideration provides that only immovables and movables shall be divided equally between the parties, anything else not expressly mentioned is excluded. To my mind such a notion is unsound in law. By its very nature, movable property comprises both corporeal and incorporeal things. According to the learned authors of *Wille's Principles of South African Law*[10] typical examples of incorporeal movables, inter alia, include real rights such as a pledge, notarial bond, mortgage bond, or any rights in personam that are connected with the transfer of movable property from one person to another or which can be satisfied by a money payment.[11] It therefore goes without saying that the parties' entitlement to each other's pension interests, which can be satisfied by a money payment, falls squarely within the rubric of movables. Seen in this light, the *maxim expressio unius est exclusio alterius* is therefore unavailing. My conclusion above, in relation to s 7(7) of the Act, renders it unnecessary to address the jurisdiction question. It suffices to say that this point was neither raised on the papers nor addressed in written or oral argument. It is trite that it is impermissible for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. (See in this regard: *Kauesa v Minister of Home Affairs & others* 1996 (4) SA 965 (NmS) at

[10] Francois du Bois et al *Wille's Principles of South African Law* 9 ed (2007) at 421-424.
[11] Ibid at 424. In footnote 167 the learned authors cite Voet 1.8.21 and *MV Snow Delta: Serva Ship Ltd v Discount Tonnage Ltd* 2000 (4) 746 (SCA) paras 9-10 in support of what they say.

973J-974A; *Welkom Municipality v Masureik & Herman t/a Lotus Corporation & another* 1997 (3) SA 363 (SCA) at 371G-H.)

[36] This leaves the question of costs. The relief to which the appellant is entitled has a bearing not only on the costs of the appeal, but also those in the court a quo. Counsel for the appellant argued that what was in contention between the parties was whether the appellant was entitled to a share of the respondent's pension interest. As the appellant has established such entitlement in this court, she has achieved substantial success entitling her to the costs of the appeal and those in the court a quo. Counsel for the respondent did not contend otherwise. The appellant is accordingly entitled to a costs order in her favour in both courts.

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

1 The appeal is upheld with costs.

2 The order of the court below is set aside and in its place the following order is substituted:

'1 Mr Phillip Jordaan of Divorce Settlement Services, Pretoria is appointed as Liquidator of the joint estate of the applicant and the respondent with the powers and obligations set out in annexure A to this judgment.

2 It is declared that the applicant is entitled to an amount equal to 50 per cent of the respondent's nett pension interest in the Government Employees Pension Fund Scheme calculated as at 25 May 2012.

3 It is declared that the respondent is entitled to an amount equal to 50 per cent of the applicant's nett pension interest in the Government Employees Pension Fund Scheme calculated as at 25 May 2012.

4 The respondent shall pay the costs of the application.'

_____

X M PETSE

JUDGE OF APPEAL

Makgoka AJA (Seriti JA concurring)

[38] I have read the erudite judgment of my colleague, Petse JA. I agree that the appeal in respect of the appointment of a liquidator, with related powers, should succeed. With regard to the appeal in respect of the pension interests of the parties, I agree, in principle, with my colleague's scholarly exposition of the law. I differ, however, with him on the application of the law to the facts of this case.

[39] My interpretation of the settlement agreement signed by the parties, and the circumstances in which it came into existence, lead me to a different conclusion, namely, that the parties had, on a proper construction of the settlement agreement, agreed to exclude their respective pension interests from the division of their joint estate. With that conclusion, it is unnecessary for this court to consider the effect of s 7(7) of the Divorce Act. For that reason, I disagree with the declaratory orders made by my colleague in respect of the parties' pension interests in terms of s 7(7) of the Divorce Act. I therefore write separately to set out the reasons for my disagreement.

[40] The basic facts, which are simple and largely common cause, have been set out in my colleague's judgment. However, I think that he has not given sufficient attention to the circumstances which gave rise to the settlement agreement. Also, I do not agree with his interpretation of the settlement agreement. I will therefore give focused attention to those aspects.

[41] The parties were married to each other in community of property on 14 January 2005. The appellant is employed as a supply chain officer in the Department of International Relations and Cooperation in Pretoria. The respondent is a major in the employ of the South African National Defence Force, Air Force Headquarters, in Pretoria. By virtue of their employment, they are both members of, and contribute to, the Government Employees Pension Fund (the GEPF).

[42] During 2011, the appellant instituted divorce action against the respondent in the North West Regional Court of Moretele (the regional court), in which she also

sought ancillary relief, namely, custody of the parties' minor children, and their maintenance, spousal maintenance and division of the joint estate. With regard to the pension interests, the appellant sought a prayer that 'each party [was] to retain his/her pension fund interest.'

[43] The divorce action was eventually settled. The terms of the settlement were recorded in a settlement agreement signed by the parties on 25 May 2012. The settlement agreement comprises slightly under 1½ pages. It has headings, making provision for the following aspects: action for divorce; custody of the minor children; maintenance of the minor children; immovables and movables; and future expenses. The headings are all in upper case, and emboldened. The specific clause which deals with the division of the joint estate reads:

'IMMOVABLES AND MOVABLES.

The joint estate shall equally be divided between the parties.'

[44] A decree of divorce was granted on 25 May 2012, and the settlement agreement concluded by the parties was made an order of court by the regional court. On 15 April 2013, the appellant's attorneys (who were not her attorneys during the divorce action), wrote a letter to the respondent and requested him to furnish them with his proposals regarding the division of the joint estate.

[45] When no response was forthcoming from the respondent, the appellant launched motion proceedings in the Gauteng Division of the High Court, Pretoria (the high court) seeking the appointment of a liquidator for the purposes of dividing the joint estate. In prayers 2 and 3 of the notice of motion, the appellant sought orders that the parties were entitled to payment of 50 per cent of each other's pension interest as at the date of the divorce. It was common cause between the parties that a liquidator should be appointed. The only dispute was on the appellant's prayers in respect of the pension interests. Clearly due to inadvertence, the high court dismissed the entire application with costs. The high court erred in that regard. It should have granted the order for the appointment of a liquidator, as this had been agreed upon by the parties.

[46] In her founding affidavit, the appellant asserted that the assets which comprised the joint estate included the parties' respective pension interests. In his answering affidavit, the respondent denied that assertion. The respondent stated that the pension interests 'did not form part of the [appellant's] claim when she instituted divorce proceedings, [and] did not form part of the settlement agreement' and that no order was made in respect thereof in terms of s 7(8) of the Divorce Act.

[47] Confronted with the respondent's version, the appellant sought, in her replying affidavit, to explain the reason why the prayers in her combined summons expressly excluded the pension interests. She explained that she was assisted by one Mr Sentsho, whom she believed to be an attorney (who later turned out not to be). According to the appellant, she had indicated to Mr Sentsho that she wished to share in the respondent's pension interest. Mr Sentsho informed to her that if she included a prayer for sharing in the respondent's pension interest, it would bring about a lot of administrative difficulties. She also sought to explain the background to the signature of the settlement agreement, in respect of which she states that on the day of the hearing she was presented with the settlement agreement, which she signed.

[48] These, briefly are the facts. I should mention, right at the outset, that s 7(7) is peremptory in its provisions. In other words, the pension interests of spouses married in community of property are, by default, deemed to be part of the joint estate. In para 33 above, my colleague emphasises this point, and correctly states one of the invariable consequences of a marriage in community of property: at the dissolution of the marriage, each party is entitled to a half-share of the joint estate, including the pension interests, where applicable, except where there is an order of forfeiture in terms of s 9(1) of the Act or an express agreement between the parties to the contrary. As already stated, I take a view that the parties have adopted the latter option in the settlement agreement.

[49] To my mind, the starting point, before considering the effect of s 7(7) of the Divorce Act, should be whether the settlement agreement as framed, is to be interpreted so as to include the parties' pension interests. Only if that question is

answered positively, would it be necessary to consider the issue of principle in terms of s 7(7). The question, in my view, should be answered in the negative, for two reasons. First, the clear language of the settlement agreement militates against that. Second, the circumstances in which the settlement agreement came into being do not lend themselves to that interpretation.

[50] With regard to the language of the settlement agreement, I have in para 43 above, referred to the clause of the settlement agreement which makes provision for the division of the joint estate. I understand that clause to mean: 'The joint estate, as identified above, being the immovables and the moveables, shall be divided equally.' Therefore, anything which does not fall within the identified category is not included in the division of the joint estate.

[51] Pension interests are neither immovable nor moveable property. In the context of a divorce action and s 7(7) and (8) of the Divorce Act, any suggestion that 'immovable and moveable property' includes pension interests is untenable. That is so because, traditionally, the pension interests did not form part of the assets of the parties. Only by special legislative enactment in the form of s 7(7)(a), were they deemed so. It is for that reason that a specific order in terms of s 7(8), distinct from the order of division of the joint estate, should be made by the court to give effect to the deeming provisions of s 7(7)(a). This point is fully discussed in paras 66-70 below. In the present case, the pension interests are excluded by the maxim *expressio unius est exclusio alterius,*[12] as applied with the necessary caution. (See for example, *Administrator, Transvaal, & others v Zenzile & others* 1991 (1) SA 21 (A) at 37G-H.) In my view, the language used in the settlement agreement concluded by the parties is plain and unambiguous.

[52] The situation would have been entirely different had there been no heading. In that event, the clause providing for the equal division of the joint estate would have constituted a so-called blanket division. That would have brought the pension interests within the purview and reach of the deeming provisions of s 7(7) of the

[12] A maxim of interpretation meaning that the express mention of one thing is the exclusion of the other.

Divorce Act. To read the clause providing for equal division of the joint estate as if the heading does not exist is, with respect, untenable. The heading clearly delineates the assets of the joint estate to be divided. By specifically mentioning the category of the assets of the joint estate to be divided, the parties clearly had the intention to exclude any other category not mentioned. Effect should therefore be given to the clear and unambiguous provisions of the settlement agreement.

[53] In *Sentinel Mining Industry Retirement Fund and Another v Waz Props (Pty) and Another* [2012] ZASCA 124; 2013 (3) SA 132 (SCA) para 10, it was observed that when interpreting a contract, headings can be taken into account. Where a heading conflicts with the body of contract, it must be the body of the contract which prevails because the parties' intention is more likely to appear from the provisions the parties have spelt out than from an abbreviation they have chosen to identify the effect of those provisions.

[54] My colleague and I are agreed that there is no conflict between the heading and the body of the relevant clause in the present case. What then was intended by the inclusion of the heading with the particular words '**IMMOVABLES AND MOVABLES**' in relation to the division of the joint estate? Those words should be given meaning. One cannot treat those words as if they do not exist. It is impermissible to do so, as it militates against a longstanding precept of interpretation that every word must be given a meaning, and that no word should be ignored, or treated as tautologous or superfluous. See *African Product (Pty) Ltd v AIG South African Ltd* 2009 (3) SA 473 (SCA) para 13; *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 99; *Kilburn v Tuning Fork (Pty) Ltd* [2015] ZASCA 53; 2015 (6) SA 244 para 15.

[55] When read together, the heading and the clause make perfect sense, given the circumstances which gave rise to the settlement agreement. The settlement agreement, by its silence on pension interests, is consistent with, and mirrors, the appellant's express exclusion of pension interests in her combined summons.

[56] I turn now to consider the circumstances under which the settlement agreement came into existence. This court, in *Natal Joint Municipality Fund v Emdumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262; 2012 (4) SA 593 (SCA) para 18, recognised that the circumstances in which a document came into being, is one of the factors to be considered when interpreting a document. Wallis JA said:

'[W]hatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' (Footnotes omitted.)

See also *Cloete Murray N.O. & another v Firstrand Bank Ltd* [2015] ZASCA 39; 2015 (3) SA 438 (SCA) para 30.

[57] My conclusion that the settlement agreement was not preceded by negotiations, and that the appellant did not have any input in its production, is not speculative, nor is it based on conjecture. What are the facts? The answer lies, first, in what the appellant does not say. She does not say that the settlement agreement was preceded by any negotiations in which she made input with regard to its terms. If she did, it should not be difficult to say so. Part of the difficulty in this regard, is the paucity of information in both the appellant's founding and replying affidavits. It seems that she consciously set out to be as sparse as possible. As the applicant, she was expected to place before the court, as much relevant information as possible. If she elected to place less, she should not expect the court to speculate in her favour. If there is adverse speculation against her, it is only because the appellant's papers are woefully lacking on detail.

[58] But what she says with regard to the production of the settlement agreement, is also instructive. It is set out in paragraph 10.10 of her replying affidavit: She says:
'At the hearing of the divorce the respondent and his legal representative presented me with the settlement agreement which was later that specific day incorporated in the order of the court. No mention was made of the pension fund and at the time of the signing of the settlement agreement I never understood the pension fund interest not to form part of the joint estate. I at all relevant times the specific day understood the pension fund to be included in the joint estate, especially in the light of the fact that it was not specifically excluded in the settlement agreement drafted by the respondent and his legal team. I was never advised differently prior to date I have approached my current legal team who explained to me the legal position.'

[59] From the above, it is clear that the respondent's attorneys were the drafters of the settlement agreement. If the appellant had negotiated with them for the inclusion of the pension interests in the settlement agreement, she would surely have enquired about its non-inclusion, on being presented with the settlement agreement. What material was known to the respondent's attorneys when the settlement agreement was produced? They knew that the appellant had expressly excluded the pension interests in her combined summons. It is therefore difficult to see how, under those circumstances, they would include the pension interests in the agreement, such never having been part of the *lis* between the parties on the pleadings, because the appellant had expressly excluded them. The drafters of the settlement agreement were therefore entitled to draft the settlement agreement on the basis of the pleadings, unless the appellant had conveyed to them a contrary attitude with regard to the pension interests.

[60] Human experience has shown that contracting parties seldom contract to their disadvantage. I therefore do not see how the respondent's attorneys would have been so benevolent as to make the respondent's pension interest part of the settlement agreement, where the appellant had expressly disavowed her entitlement thereto. It must be borne in mind that had the respondent not defended the divorce action, the regional court would in all likelihood, have granted an order that each party was to retain their own pension interest, as requested by the appellant in her combined summons.

[61] It is therefore quite ironic that by defending the matter and concluding a settlement agreement in the manner it was worded, the respondent would suddenly be deemed to have bestowed a right on the appellant, which she expressly had disavowed in her combined summons. Under the circumstances, the appellant could only be entitled to share in the respondent's pension interest if the settlement agreement was a product of negotiations, during which she insisted that the pension interests be included as part of the settlement agreement. From the facts available to us, this was not the case. It seems the settlement agreement was presented to the appellant by the respondent's attorneys as a *fait accompli* on the day of the hearing of the divorce action.

[62] This brings me to the appellant's statement (in paragraph 10.10 of her replying affidavit) that at the time of signature of the settlement agreement, she 'never understood the pension fund interest not to form part of the joint estate.' This can simply not be correct. Having expressly excluded the pension interests in her combined summons, she could possibly not have had such an understanding. That could only be, if she had a change of heart on that aspect, and conveyed that to the respondent's attorneys before the settlement agreement was drafted. As stated already, this does not appear to have happened. At least she does not say so, and there is nothing in the record to suggest otherwise.

[63] But if there is any residual doubt about whether the appellant considered the settlement agreement to incorporate the pension interests, paragraph 10.12 of her replying affidavit offers a complete answer. There, the appellant essentially acknowledges that the settlement agreement falls short of including the pension interests as part of the assets to be divided. She says:

'If the legal position was explained to me I would never have instituted the action in the manner I did, and in addition hereto I never would have signed the settlement [agreement] in the manner it was presented to me.'

[64] In my view, there can be no clearer indication of the appellant's mind-set (as to whether the pension interests formed part of the settlement agreement). It is plain that the appellant recognizes that terms of the settlement agreement are insufficient

to be read as to include the pension interests. For, if her case is that the settlement agreement as drafted also incorporates the pension interests, why would she 'never have signed' it in its present wording? The above statement seems to contradict the essence of the appellant's case, which, as already stated, is that the terms of the settlement agreement do incorporate the parties' pension interests.

[65] One has sympathy for the appellant because clearly she was assisted by an unqualified person in drafting her papers in the regional court. She was apparently unrepresented when she signed the settlement agreement, which she appears not to have had any role in negotiating its terms. One option open to her would have been to approach the court for the rectification of the settlement agreement on the basis that it did not correctly reflect the intention of the parties. But she, on advice I suppose, elected to seek an order in terms of s 7(7) and 7(8)(*a*) of the Divorce Act on the basis of a settlement agreement which, in my view, patently does not permit of such an order. I would, very reluctantly, non-suit her on this portion of the appeal, for all of the reasons stated above.

[66] Lastly, and for the sake of completeness, there is also the issue of jurisdiction. This issue, as to which court is competent to grant an order in terms of s 7(8) of the Divorce Act, was pertinently debated during the hearing with the appellant's counsel, during which counsel conceded, correctly so, that this court does not have jurisdiction to grant an order in terms of s 7(8)(a) as had been requested by the appellant in the high court. My colleague discusses this issue in para 30, and states that '[I]t is ….not necessary to decide this point as counsel for the appellant accepted that it would not be competent for this court to decide this issue for the first time on appeal…' My colleague then concludes that it is not necessary to decide the point, but accepts, correctly so, in my respectful view, that 'the wording of s 7(8) …seem to restrict the grant of such an order to the "court granting the decree of divorce"'

[67] In my view, it is necessary to determine the issue. I do so. Section 7(8)(*a*) of the Divorce Act reads:

'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) 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.'

[68] The above sub-section makes plain that the court which may grant an order directing a pension fund to pay a pension interest to a non-member spouse, is the court granting the decree of divorce. The court with the requisite jurisdiction is the regional court. This is the court to which the appellant should have directed her application. The upshot of this is that the high court lacked jurisdiction to determine prayers 2 and 3 of the appellant's notice of motion. It should have declined to hear that portion of the appellant's application. It is trite that a decision taken absent proper jurisdiction is void. As explained by this court in *Tödt v Ipser* 1993 (3) SA 577 (A); [1993] 2 All SA 303 (A) at 589B-C:

'According to our common-law authorities judgments are void in only three types of cases – where there has been no proper service, where there is no proper mandate or where the court lacks jurisdiction. See *Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) Pty Ltd* 1961 (4) SA 415 (T) at 422E-424H; *S v Absalom* 1989 (3) SA 154 (A) at 163C and 164E-G; and the earlier authorities cited in these cases…'

[69] By parity of reasoning, this court is similarly placed. It is for that reason that this court is not making an order in terms s 7(8)(*a*), and is restricting itself to a declaratory order in terms of s 7(7). This does not help the appellant much, because, absent an order in terms of s 7(8)(*a*), the declaratory order in terms of s 7(7) remains enforceable only between the parties. The pension fund to which they both belong, the GEPF, is empowered by law to give effect only to an order made in terms of s 7(8)(*a*).

[70] Such an order must direct the pension fund to make payment of a member's pension interest to a non-member spouse, and endorse its records accordingly. A declaratory order such as the one made by my colleague, is not sufficient. The

upshot of this is that, unless and until one of the parties approaches the regional court for an order in terms of s 7(8)(*a*) of the Divorce Act, the appellant's victory in this court would remain hollow and a *brutum fulmen*, as far as the GEPF is concerned.

[71] In conclusion, it is appropriate to refer to the observations made by this court in *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) 373 (SCA) para 26, in which the importance of carefully formulating settlement agreements and divorce orders relating to pension interests, was emphasised. This is to ensure that they fall within the ambit of s 7(7) and (8) of the Divorce Act. The dispute in the present case would have been avoided had this been heeded.

[72] Like my colleague, I would uphold the appeal to the extent that the high court failed to grant a prayer for the appointment of a liquidator, despite it being common cause between the parties that such a prayer should be granted. I would make no order in respect of the appeal relating to the pension interests. For the reason that the appellant had sought an order in respect of pension interests in a wrong forum, I would accordingly order that each party should pay its own costs, both in the high court and in this court.

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T M Makgoka
Acting Judge of Appeal

APPEARANCES:

For the Appellant:	M Haskins SC (with R M Molea) Instructed by: Shapiro & Haasbroek Inc, Pretoria Lovius Block, Bloemfontein
For the Respondent:	J L Basson Instructed by: Makokga Sebei Inc, Kempton Park Phatshoane Heney Inc, Bloemfontein

Annexure A

APPOINTMENT OF LIQUIDATOR AND/OR RECEIVER OF THE JOINT ESTATE OF PLAINTIFF AND DEFENDANT

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1. PHILLIP JORDAAN is hereby appointed as Liquidator in the joint estate of the above PLAINTIFF and DEFENDANT to realise the whole of the joint estate assets, movable and immovable, and for that purpose to sell them or any part of them, by public auction or by private agreement as may seem most beneficial with leave to both parties to bid, to collect debts due to the joint estate unless the same be disposed of by sale, to pay the liabilities of the joint estate, to prepare a final account between PLAINTIFF and DEFENDANT, and to divide the assets of the joint estate after payment of its liabilities in accordance with the account.

2. THE LIQUIDATOR SHALL HAVE THE FOLLOWING POWERS:

2.1 The right to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets comprising the joint estate;

2.2 the right to obtain information regarding their financial affairs from bank managers, building societies, managers or any other financial institutions where monies may have been invested.

2.3 the right to obtain information from auditors of private companies or business and personal accountants with regard to personal affairs and tax matters and any other person who may have knowledge of the affairs

2.4 the right to obtain and call for balance sheets in respect of all companies or businesses in which the parties have interest;

2.5 the right to inspect books of account in respect of any company or business where the parties may have an interest and also the right to inspect personal bank statements, paid cheques, deposit books and personal statements of affairs and liabilities which may have been drawn for tax and other purposes;

2.6 the right to make physical inspection of assets and take inventories;

2.7 the right to question the parties and obtain all explanations deemed necessary by them for the purpose of making the division;

2.8 without limitation to the aforegoing, the rights which are conferred on a Trustee in terms of the provisions of the Insolvency Act Number 24 of 1936 and in particular the rights to call meetings of creditors to perform interrogatories to take charge of the property of the joint estate, to open bank accounts and to deal with investments as provided for in terms of sections 64, 65, 66, 68, 70 and 72 of Act 24 of 1936;

2.9 in particular the Liquidator is empowered to distribute and allocate the movable assets of the joint estate between PLAINTIFF and DEFENDANT and will not be obliged to realise/sell all the assets of the joint estate;

2.10 the Liquidator is empowered to locate assets for the joint estate out of the Republic of South Africa, to proceed overseas to take evidence in location of such assets on commission de bene esse if needs be for the purpose of taking in possession assets of the joint estate;

2.11 the Liquidator is authorised, with the concurrence of the affected pension funds, to effect the necessary endorsement against any pension interest of the parties in terms of section 7[8] of the Divorce Act No 70 of 1979 and the same shall apply to the insurance policies of the parties.

3. DUTIES OF THE LIQUIDATOR

The Liquidator is obliged to collect all assets, discharge all liabilities and pay to the parties after deduction of his fees and the legal costs of the parties in the divorce action and interlocutory applications in that action and any other amounts due, the residue of the joint estate to each party in equal shares. Included in the aforegoing will be the right to realise all assets on such terms as the Liquidator may deem fit, including by public auction, private treaty or otherwise.

4. SECURITY

The Liquidator is not required to find security for his administration.

5. RELEASE OF THE LIQUIDATOR:

The Liquidator shall be relieved of his duties as follows:

5.1 Upon completion of his account, the Liquidator will forward a copy of such account to the parties' respective attorneys.

5.2 The liquidator will send his account by prepaid registered mail or hand-delivery to the addresses as reflected above.

5.3 Both PLAINTIFF and DEFENDANT shall be entitled to raise objections to the said account within 14 [FOURTEEN] DAYS from date that such accounts had been sent. Should the Liquidator not receive any objections from either PLAINTIFF or DEFENDANT within the fourteen day period, the said account shall be deemed to have been confirmed by PLAINTIFF and DEFENDANT and the Liquidator shall proceed to finalise the estate in accordance with the said account.