

The Law Regarding Pension Interest in South Africa has been settled! Or has It? With Reference to *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162



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Abstract

This article reflects on the law relating to pension interest in South Africa. In particular, it assesses whether the Supreme Court of Appeal in *Ndaba v Ndaba* (600/2015) [2016] ZASCA 162 adequately clarified how this area of law should be understood. In the light of the inconsistent approaches from various divisions of the High Court, it has not always been clear how the courts should interpret the law relating to pension interest in South Africa. In this paper, aspects of this area of law which have been clarified by the Supreme Court of Appeal are addressed. The paper also addresses aspects of this area of law which the Supreme Court of Appeal had not settled and which could potentially be subject to future litigation. The paper is based on the premise that while *Ndaba v Ndaba* is welcomed, the Supreme Court of Appeal nonetheless missed a golden opportunity to authoritatively provide a basis upon which the law relating to pension interest in South Africa should be understood.

Keywords

Pension interest; entitlement; divorce; pension fund; spouse.

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1 Introduction

As differing judicial opinions on the law relating to pension interests have been expressed by various divisions of the High Court in South Africa¹ there has been a dire need for either the Supreme Court of Appeal or even the Constitutional Court to provide clarity on how section 7(7) of the *Divorce Act*² should be interpreted in South Africa. The judicial interpretation of sections 7(7) and (8) of the *Divorce Act* read together with section 37D(1)(d)(i) of the *Pension Funds Act* 24 of 1956 and/or section 21(1) of the *Government Employees Pension Law*, 1996 has been subject to controversy, thus attracting warranted academic criticism in recent times.³

In the mist of confusion relating to the proper approach to the law relating to pension interests in South Africa, various issues needed to be clarified, such as whether or not the non-member spouse was entitled to his or her spouse's pension interest; how the non-member spouse derived an entitlement to his or her member spouse's pension interest; whether or not the pension interest fell automatically within the joint estate by operation of law; whether or not the court was competent to order the member spouse's retirement fund to pay over to the non-member spouse the percentage of his or her member spouse's pension interest at divorce when such was not pleaded and prayed for in the divorce papers; whether or not retirement funds are justified in refusing to pay percentages of the pension interests to non-member spouses on the strength of the decree of divorce not citing or incorrectly citing the name of such funds; and whether or not a non-member spouse should be burdened with the obligation to approach a court for the variation of his or her divorce decree notwithstanding the fact that the relevant pension fund has confirmed that one of the parties to the divorce is its contributing member. The Supreme Court of Appeal had an opportunity

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¹ See *Elesang v PPC Lime Limited* (NC) unreported case number 1076/2006 of 15 December 2006; *Sempapalele v Sempapalele* 2001 2 SA 306 (O); *Maharaj v Maharaj* 2002 2 SA 648 (D&CLD); *Lamb v Lamb* 2002 JDR 0463 (T); *Chiloane v Chiloane* 2007 ZAGPHC 183 (7 September 2007); *Maria v Brian* 2008 ZAGPHC 317 (28 August 2008); *Peters v Peters* 2008 ZAWCHC 309 (2 December 2008); *M v M* 2012 ZAKZDHC 17 (1 January 2012); *O v O* 2012 ZANHC 20 (24 February 2012); *Kgopane v Kgopane* 2012 ZANWHC 58 (16 August 2012); *Kotze v Kotze* 2013 JOL 30037 (WCC); *M L v J L* 2013 ZAFSHC 55 (25 April 2013); *Fritz v Fundsatwork Umbrella Pension Fund* 2013 4 SA 492 (ECP); *Eskom Pension and Provident Fund v Krugel* 2012 6 SA 143 (SCA); *M v M* 2014 ZAGPJHC 296 (29 October 2014); *M v M* 2016 ZALMPPHC 2 (17 June 2016); and *Motsetse v Motsetse* 2015 2 All SA 495 (FB).

² *Divorce Act* 70 of 1979.

³ See Marumoagae 2014 *PELJ* 2488-2524; Marumoagae 2016 *De Rebus* 30.

not only to answer some or more of these questions but to also clarify the law relating to pension interest in *Ndaba v Ndaba*.⁴ This note discusses the manner in which the Supreme Court of Appeal sought to clarify the law relating to pension interest in South Africa. More particularly, I shall be demonstrating that while the Supreme Court of Appeal clarified the law in some respects, nonetheless there are certain aspects relating to the law regarding pension interest which remain unsettled.

2 Issues before the court

The facts of *Ndaba v Ndaba* are not necessarily important for the purposes of this note. It suffices to note that in this case the parties were married to each other in community of property and pursuant to their divorce they signed a settlement agreement, which was incorporated into the divorce decree. While this settlement agreement listed some of the parties' movable and immovable assets, which constituted their joint estate, it was silent on the issue of pension interest. Post their divorce, the parties could not amicably divide their joint estate, a fact which led the wife to institute action for the appointment of a liquidator to attend to the division of the joint estate. In her application, over and above the division of the joint estate, she sought an order that she and her former husband be paid 50% of each other's pension interests. Both parties were members of the Government Employees Pension Funds.⁵ While the husband was not opposed to the application *per se*, he nonetheless resisted the claim that the parties' pension interests formed part of the parties' joint estate and was thus liable for division.⁶ In particular, he relied on the fact that such an order had not been sought from or granted by the court which granted the divorce, and it did not form part of the settlement agreement.⁷ The husband's argument was that the wife had renounced her claim to his pension interest by failing to request the trial court to deem it to be part of the joint estate during the divorce proceedings. The wife's application was dismissed by the High Court and she appealed to the Supreme Court of Appeal.

The Supreme Court of Appeal was called upon to clarify the interpretation of sections 7(7) and (8) of the *Divorce Act*. In the resolution of the disputes between the parties in this case, the court had to decide "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

⁴ *Ndaba v Ndaba* 2016 ZASCA 162 (4 November 2016) (hereafter *Ndaba v Ndaba*).

⁵ *Ndaba v Ndaba* para 41.

⁶ *Ndaba v Ndaba* para 4.

⁷ *Ndaba v Ndaba* para 4.

divorce order".⁸ In particular, the court had to decide whether a settlement agreement which, while expressly providing for movable and immovable assets of the joint estate, was silent on the issue of the pension interest could be interpreted as including the pension interest of one or both of the parties. This led the SCA to deal with a fundamental question which has been a subject of controversy since the judgment of Musi J in *Sempapalele v Sempapalele*⁹ relating to whether or not a non-member spouse is entitled to his or her member's spouse's pension interest as at the date of divorce. In addressing this issue several questions arose before the court. Is it necessary in divorce papers to plead and pray with regard to a pension interest in order for the court to make a specific order in relation thereto? Does a pension interest need first to be deemed by a court to fall within the member's estate in order for it to be available for division upon divorce? Is it necessary for the court granting the divorce order to specifically state in such an order that a portion of the pension interest should be paid by the retirement fund to the non-member spouse? Can a former member spouse who has already received his or her retirement benefits be ordered post-divorce to pay a portion of such benefits to his or her former non-member spouse, as was the case in *Kotze v Kotze*?¹⁰ The manner in which the court attempted to answer some of these questions is discussed below.

2.1 Interpretation of sections 7(7) and (8) of the Divorce Act

Petse JA, writing for the majority, expressly said that the primary issue to be determined in *Ndaba v Ndaba* was the proper interpretation of sections 7(7) and (8) of the *Divorce Act*.¹¹ This observation provided hope that finally the SCA would provide an authoritative overview of how section 7(7) of the *Divorce Act* in particular should be interpreted in South Africa. In other words, this provided an expectation that the SCA would finally clarify the law relating to pension interest in South Africa, because this section is at the heart of the controversy relating to the manner in which courts have dealt with claims regarding pension interests. However, the court immediately narrowed the scope of its investigation by limiting its analysis to the facts of the case, thus missing out on a golden opportunity to authoritatively explain how the law relating to pension interests should be understood in South Africa.¹² While this judgment is welcomed and thus answered some of the questions which have been troubling various divisions of the High Court,

⁸ *Ndaba v Ndaba* para 1.

⁹ *Sempapalele v Sempapalele* 2001 2 SA 306 (O).

¹⁰ *Kotze v Kotze* 2013 JOL 30037 (WCC).

¹¹ *Ndaba v Ndaba* para 1.

¹² *Ndaba v Ndaba* para 11.

there are nonetheless several questions which remain unanswered and which will be subject to future litigation, as will be demonstrated below.

2.1.1 *Entitlement to the pension interest*

In paragraph 11 of the judgment the court narrowed the ambit of what needed to be determined in this case when it held that:

... 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.

This is indeed an important question which has troubled various divisions of the High Court, and the SCA's intervention was more than welcomed. However, focusing solely on the entitlement of the non-member spouse to the member spouse's pension interest, more particularly when the decree of divorce is silent on the issue, precluded the SCA from answering other pertinent issues relating generally to section 7(7) of the *Divorce Act*, which are highlighted in the introduction above.

While the court was uncomfortable with engaging in a thorough reflection of each of the decisions of various divisions of the High Court, it nonetheless showed how such decisions generally conflicted one another. That discussion will not be repeated here, as it has been captured elsewhere.¹³ The court rejected the view that a non-member spouse becomes entitled to a share of his or her member spouse's pension interest only if the court granting the decree of divorce makes such a declaration in terms of section 7(8)(a) of the *Divorce Act*.¹⁴ The court correctly confirmed first that indeed the non-member spouse is entitled to his or her member spouse's pension interest; and second, that such entitlement is not at the mercy of the court, in that the entitlement does not arise because the court made an order that the non-member spouse should be paid a portion of his or her member spouse's pension interest in terms of section 7(8) of the *Divorce Act*. In particular, the court held that:

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[ection] 7(8). To

¹³ Marumoagae 2014 PELJ 2488-2524.

¹⁴ The SCA was effectively rejecting the argument that "... although a pension interest of a member spouse is deemed to form part of the assets that constitute the patrimonial benefits of the marriage, a non-member spouse becomes entitled to a percentage of the pension interest only when it is assigned to him or her in terms of s 7(8)". See Davey 2013 *De Rebus* 27.

my mind, it would be inimical to the scheme and purpose of s[ection] 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.¹⁵

None of the previous High Court cases had precisely determined the parameters of the entitlement or otherwise which a non-member spouse has to his or her member spouse's pension interest. There have also been conflicting academic opinions on this issue. On the one hand, Van Niekerk incorrectly in my view argues that:

- (i) A party to a divorce action who is not a member of a specific pension fund does not acquire any right *per se* to the pension interest of a member of such fund simply by virtue of the fact that the parties are married or in the process of divorce. The pension interest is only relevant in so far as it is necessary to determine the financial benefits to which a party may be entitled to pursuant to the divorce, with due regard to the applicable matrimonial regime of the parties.
- (ii) It is therefore not competent to claim one half of the pension interest of the member of a pension fund in a divorce action simply by virtue of the fact that the parties to such action are married, and a proper case must be made out for any relief based on a claim for the transfer of a pension interest from the member of the relevant pension fund to the non-member spouse. Even where spouses are married to each other in community of property, this does not entitle a party to such a claim, for the relevance of the pension interest is simply in respect to the value of the joint estate.¹⁶

This argument is supported by Pienaar, who has argues that Van Niekerk—

... advocates a practical approach to s[ection] 7(7)(a) of the Act and argues that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate.¹⁷

Van Niekerk engages in a fundamental debate relating to whether or not a non-member spouse has a right to claim his or her member spouse's pension interest as at the date of divorce, and concludes that such a non-member spouse does not acquire such a right. Secondly, he argues that despite the parties' marital regime, the non-member spouse is not entitled to his or her member spouse's pension interest. In support of Van Niekerk's views, Pienaar combines both the issue of a right and that of an entitlement and incorrectly in my view concludes that a non-member spouse is not by right entitled to his or her member spouse's pension interest.¹⁸

¹⁵ *Ndaba v Ndaba* para 25.

¹⁶ Van Niekerk *Patrimonial Litigation in Divorce Proceedings* para 7.2.4.

¹⁷ Pienaar 2015 *De Rebus* 38.

¹⁸ Pienaar 2015 *De Rebus* 38.

The word "entitlement" denotes that there is a right - in actual fact "a right to benefits specified especially by law or contract".¹⁹ Assuming that I am correct with this definition, on Van Niekerk and Pienaar's analysis of the law relating to pension interest, the non-member spouse does not have a right to claim his or her member spouse's pension interest. It is worth noting that Van Niekerk's work was acknowledged with confirmation by the SCA in *Ndaba v Ndaba* as far as the fiction created by section 7(7) of the *Divorce Act* is concerned in relation to the pension interest of a member spouse becoming an integral part of the joint estate upon divorce which is to be shared between the parties. In this respect, the court agreed with Van Niekerk that:

... where 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.²⁰

However, the court did not confirm Van Niekerk's²¹ argument that:

[e]ven where spouses are married to each other in community of property, this does not entitle a party to such a claim, for the relevance of the pension interest is simply in respect to the value of the joint estate ...

as supported by Pienaar. In actual fact, it appears that the SCA indirectly and correctly rejected this argument when it held that:

[t]he language of s[ection] 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.²²

On the other hand, I have criticised Pienaar and Van Niekerk's argument that non-member spouses are not by right entitled to their member spouses' pension interest. I have argued further that:

Pienaar relying on PA van Niekerk *A practical guide to patrimonial litigation in divorce actions* (Durban: LexisNexis 2011), incorrectly in my view, argues that parties in a divorce are not by right entitled to a part of the other's pension interest, but that the value of the pension interest should merely be taken into consideration when determining the value of the assets of the estate.

I submit that this observation is seriously misleading ... because the commission in its recommendations left the issue of "[t]he non-member's spouse's entitlement to a share of the member spouse's pension interest on divorce ... to be determined by the rules of the matrimonial property

¹⁹ Merriam-Webster date unknown <http://www.merriam-webster.com/dictionary/entitlement>.

²⁰ *Ndaba v Ndaba* para 26.

²¹ Van Niekerk *Patrimonial Litigation in Divorce Proceedings* 7.2.4.1.

²² *Ndaba v Ndaba* para 26.

dispensation applicable to the marriage" (Discussion Paper (*op cit*) at 10). This simply means that the marital regime of the parties determines whether or not the non-member spouse would be entitled to the pension interest of the member spouse. If parties are married in community of property or with the application of the accrual system (unless excluded in the antenuptual contract) then the non-member spouse would be entitled to share in the pension interest of the member spouse as a right. Such a right is established by the marital regime and then consolidated by the deeming provision in s 7(7)(a) of the Divorce Act.²³

Basically my argument is that non-member spouses are entitled to claim their member spouse's pension interests when the parties divorce and such an entitlement is not dependent on what the court does.²⁴ If the word entitlement is interpreted literally and in accordance with the Merriam-Webster English Dictionary referred to above, that would entail firstly that the non-member spouse has a right to claim his or her non-member spouse's pension interest as at the date of divorce by means of section 7(7) of the *Divorce Act*, which deems the pension interest of the member to fall into his or her estate. Secondly, the contract of marriage either in community of property or where the accrual system is applicable confers upon the non-member spouse a right to claim the pension interest of his or her non-member spouse upon divorce. This view is supported by the SCA's decision in *Ndaba v Ndaba*, where the court held that:

[section] 7(7)(a) is self-contained and not made subject to [section] 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 [section] 7(8).²⁵

²³ Marumoagae 2016 *De Rebus* 30.

²⁴ See *M v M* 2012 ZAKZDHC 17 (1 January 2012), where it was held that the fact that no order is made in terms of s 7(8)(a) of the *Divorce Act* at the time of the divorce, does not preclude the non-member spouse from later making a claim against the other former spouse for a portion of the pension proceeds. Also see *Chiloane v Chiloane* 2007 ZAGPHC 183 (7 September 2007), where it was reiterated that "a spouse seeking a share in the pension interest of the other spouse who had not in terms of Section 7(8)(a) applied for and obtained a Court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted". In *Kotze v Kotze* 2013 JOL 30037 (WCC) the full bench held that "[w]here 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 a separate pension or provident fund either by a way of settlement agreement or by an order of forfeiture, each of them nonetheless remains entitled to a share in the pension or provident fund to which the other spouse belonged 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".

²⁵ *Ndaba v Ndaba* para 25.

It is submitted that the question of whether or not a non-member spouse is indeed entitled to his or her member spouse's pension interest upon divorce has now been settled by the SCA. In other words, the non-member spouse married in community of property and by extension where the accrual system is applicable is entitled to claim his or her member spouse's pension interest as at the date of divorce.

2.1.2 *Making out a case for the pension interest in divorce papers*

At the heart of the controversy relating to the interpretation of section 7(7) of the *Divorce Act* is what the non-member spouse should do during the divorce proceedings in order to be able to be paid his or her percentage of the non-member spouse's pension interest. This provoked three distinct but interrelated questions:

- a) Should the party seeking to be paid a portion of his or her member spouse's pension interest as at the date of divorce specifically plead and pray for the pension interest in order for the court to order the retirement fund to pay to him or her such portion in terms of section 7(8) of the *Divorce Act*?
- b) If the party seeking a pension interest failed to specifically plead and pray for a pension interest order, is the court precluded from making an order regarding the pension interest?
- c) If the divorce decree is silent on the issue of the pension interest, is the member spouse's retirement fund justified in refusing to pay to the non-member spouse a portion of the member spouse's pension interest despite the fact that the member spouse who is a party to a divorce is its contributing member?

These are difficult but important questions which have also troubled divorce litigants and their legal representatives to the extent that many have been made to approach the courts to seek variation orders in order to ensure that finally the required pension interests are paid.

The controversy was started by Musi J in *Sempapalele v Sempapalele*,²⁶ where he held that "a spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate Court order during the divorce proceedings".²⁷ This implied that when the divorce papers were

²⁶ *Sempapalele v Sempapalele* 2001 2 SA 306 (O) 312.

²⁷ See *M v M* 2016 ZALMPPHC 2 (17 June 2016) para 25, where it was correctly held that "the law as set out earlier in the *Sempapalele* is no longer good law".

silent on the pension interest, the court's hands were tied and it could not make any pronouncements relating to the pension interest. This view was followed in *ML v JL*,²⁸ where it was held that "[i]n order to properly decide whether the defendant is entitled to have a proportionate share in the pension interest of the plaintiff, sufficient and accurate details of the pension fund have to be placed before the court".²⁹ The court further held that "[i]t is clear and obvious that unless such details are known and disclosed a court decreeing divorce would be unable to make an order".³⁰ A different approach was followed in *M v M*, where the court held that "[t]he pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specifically applied for or pleaded to be part of the joint estate".³¹

Given the existence of the differing opinions expressed by various divisions of the High Court, the SCA in *Ndaba v Ndaba* was called upon to provide clarity on this issue. Challenges to clarity in such matters arise in a variety of ways. For instance, the parties could have the so-called "blanket divorce", wherein provision of how the assets should be divided are not made and the court merely grants a division of the joint estate, or the parties can conclude a settlement agreement but fail to include the pension interest when making provision of how the assets ought to be divided, as was the case in *Ndaba v Ndaba*. In this case, the majority held that:

[i]n 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.³²

This means that irrespective of whether or not the party seeking a pension interest pleaded and prayed for such an order, he or she retains his or her right to claim the pension interest, even post-divorce. However, it is

²⁸ *ML v JL* 2013 ZAFSHC 55 (25 April 2013) (hereafter *ML v JL*).

²⁹ *ML v JL* para 31.

³⁰ *ML v JL* para 32. It is worth noting that both *Sempapalele v Sempapalele* and *ML v JL* were the decisions of single judges in the Free State division, and were subsequently overruled by the two judges' court of the same court in *Motsetse v Motsetse* 2015 2 All SA 495 (FB) para 18, where it was held that "[i]n paragraph 57 of that judgment it appears that the Court concurs with the findings in the *Sempapalele* judgment. In particular, the Court found that a pension interest does not automatically fall within the ambit of a customary division of the joint estate and it can only be part of a division if a specific order is made by a Court in that regard. The Court found that it has to be pertinently pleaded and claimed. I am unfortunately not able to agree".

³¹ *M v M* 2016 ZALMPPHC 2 (17 June 2016) para 27. Also see *Motsetse v Motsetse* 2015 2 All SA 495 (FB).

³² *Ndaba v Ndaba* para 31.

submitted that the SCA did not settle the controversy relating first to whether or not a court can grant an order relating to a pension interest despite the divorce papers being silent on the issue, and second to whether or not in order for the court to grant an order the party seeking such an order should first plead and pray for such an order. In this respect, the court in *Ndaba v Ndaba* did not at all consider *M v M*³³ and *Motsetse v Motsetse*,³⁴ where this issue was appropriately dealt with. The facts of the case warranted the court's dealing with this issue. For instance, the husband in *Ndaba v Ndaba* argued that the wife had failed to claim his pension interest during the divorce, and further that in any event even if she had claimed it he would have resisted the claim.³⁵ The court should have clarified what the position is when a person fails to make a case for a pension interest, and the role of the court thereto. In this respect, the court missed a golden opportunity to provide the much-needed clarity, more specifically for divorce practitioners and retirement funds generally.

It was indeed imperative for the SCA to clarify the law in this regard because of the unwarranted treatment of non-member spouses with divorce decrees which are either silent on the subject of the pension interest or which reflect incorrectly the name of the retirement fund. These non-member spouses are forced to approach courts to vary divorce decrees in order for retirement funds to pay them their portions of member spouses' pension benefits, despite the fact that such retirement funds have confirmed that indeed one of the parties to the divorce is their contributing member. If the SCA could have expressly pronounced on this issue in line with *M v M*,³⁶ there would no longer be a need for non-member spouses who have identified the correct retirement funds to which their member spouses are contributing to be required to amend their divorce decrees before payment can be effected. The failure by the SCA to address this issue means that retirement funds will still be able to unnecessarily burden non-member spouses who are in possession of what they term "deficient" divorce decrees to vary such orders, at great costs. Furthermore, this creates a further space for courts

³³ *M v M* 2016 ZALMPPHC 2 (17 June 2016).

³⁴ *Motsetse v Motsetse* 2015 2 All SA 495 (FB).

³⁵ In *Ndaba v Ndaba* para 5, Petse JA observed that "... 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[ly] 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".

³⁶ *M v M* 2016 ZALMPPHC 2 (17 June 2016).

to require non-member spouses to specifically pray and claim pension interest before they can make orders related thereto.

2.1.3 *Does pension interest form part of the joint estate?*

The controversy relating to the proper interpretation of section 7(7) of the *Divorce Act* includes whether or not the pension interest forms part of the joint estate. This question raises a broader question relating to whether or not a pension interest is an asset which can properly be taken into consideration when arranging the division of the assets within the joint estate or determining the accrual when parties are married subject to the accrual system upon divorce. In *Ndaba v Ndaba*, Makgoka AJA writing for the minority took issue with the manner in which the majority judgment approached and interpreted the settlement agreement in this case. The starting point for the majority judgment was that by virtue of the parties being married in community of property and notwithstanding the contents of the settlement agreement, the pension interest should be regarded as part of the parties' joint estate.³⁷ According to Makgoka AJA, "[p]ension interests are neither immovable nor moveable property. In the context of a divorce action and s[ection] 7(7) and (8) of the Divorce Act, any suggestion that 'immovable and moveable property' includes pension interests is untenable".³⁸ The essence of this reasoning is that if provision were made for pension interest in the settlement agreement, such would have been made neither in the immovable nor movable sections of the settlement agreement. A section dealing specifically with the pension interest would have been made in the settlement agreement, hence failure to incorporate such a section amounts to waiving the right to claim the pension interest. In particular Makgoka AJA's interpretation of the settlement agreement in this case was—

... 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[ection] 7(7) of the Divorce Act.³⁹

³⁷ *Ndaba v Ndaba* para 34.

³⁸ *Ndaba v Ndaba* para 51. This reasoning is in line with *M v M* 2016 ZALMPPHC 2 (17 June 2016) para 11, where it was correctly held "[a]ccordingly, that pension interest is part of the bundle of assets to be divided up between the divorcing spouses. Of course, the pension interest is simply a value calculated as at date of divorce. It is that 'value' which falls into the reckoning of the total value of the basket of assets along with all the other assets in the joint estate. When the value of each spouse's half share is then known, the assets in the joint estate are then apportioned".

³⁹ *Ndaba v Ndaba* para 39

The view that the parties expressly excluded their respective pension interests seems to be motivated by the husband's argument that the pension interest did not form part of the wife's claim in her divorce papers and was also not included in the settlement agreement.⁴⁰ It is somewhat surprising that Makgoka AJA was persuaded by this argument, given the fact that he acknowledged and accepted the fact that the wife was assisted by an incompetent person who purported to be an attorney, whose advice the wife relied upon to her detriment.⁴¹ It was also clear from the facts that the settlement agreement was not negotiated by the parties but was only presented to the wife to sign. It is submitted that Makgoka AJA's strict interpretation of the settlement agreement as a contract between the parties is unsound in relation to matrimonial matters and would lead to the courts not properly investigating the circumstances within which divorce settlement agreements before them were concluded.

I am of the view that Petse JA's approach in this regard is sound in law, because it creates room for the court to be able to address injustices which can be associated with settlement agreements in divorce matters. This is so because there is no evidence in this case that the settlement agreement which was signed by the parties was preceded by negotiations between them, particularly taking into account the fact that the settlement agreement was a product of the husband's own legal assistance, with no input from the wife. Further, Makgoka AJA's reasoning that a pension interest should be classified as neither a movable nor an immovable asset does not seem to be sound in law. In this respect, Petse JA correctly observed that "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".⁴²

Petse JA was of the view that "[t]he joint estate in this case must necessarily include the pension interest of either party as contemplated in s[ection] 7(7)(a) of the Act".⁴³ It is difficult to understand whether this was a *ratio* to the effect that a pension interest forms part of the parties to a marriage in community of property's joint estate, or if this was specific to the facts of this case. I am therefore of the view that it cannot be said that the SCA has settled the question whether or not a member spouse's pension interest forms part of the joint estate.

⁴⁰ *Ndaba v Ndaba* para 46.

⁴¹ *Ndaba v Ndaba* para 65.

⁴² *Ndaba v Ndaba* para 35.

⁴³ *Ndaba v Ndaba* para 34.

At first glance, it might seem as if it is unnecessary to answer this question, given the deeming provisions of section 7(7) of the *Divorce Act*. However, the deeming provisions provoke the need not only to answer this question but also to debate it. Section 7(7) of the *Divorce Act* deems the pension interest for the purposes of divorce to fall within the estate of the member spouse. Section 7(7)(a) of the *Divorce Act* provides that "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". This section does not provide that the pension interest will be deemed to be part of the joint estate. It is thus unclear what formula or mechanism is used to transfer the member's pension interest from his (or her) personal estate into the joint estate after it has been deemed as an asset in order to enable the non-member spouse to claim a portion thereof. It is submitted that the deeming provision creates an unnecessary confusion which should be cleared up, preferably by the legislature. It would be ideal to amend section 7(7) of the *Divorce Act* in order to remove the deeming provision and make it clear that the pension interest falls automatically within the parties' joint estate, regardless of whether or not the parties are divorcing. Such a provision would automatically render a pension interest an asset in the joint estate which can properly be taken into account even in the so called "blanket divorces". The deeming provision currently entails that "any other 'right' or 'interest' which the member spouse may have in respect of pension benefits which have not yet accrued is ... not to be regarded as an asset in the estate of such a member spouse in determining the patrimonial benefits to which the parties to the divorce action may be entitled".⁴⁴ It is unfortunate that the SCA in *Ndaba v Ndaba* did not clarify once the pension interest has accrued due to the divorce whether or not it would be regarded as an asset in the member's estate or even in the parties' joint estate, and if the latter, how so.

2.1.4 Can a court order the payment of pension benefits to the former non-member spouse once they have been paid to the member spouse?

In practice, for a variety of reasons, where parties divorce without properly making provision for how the assets which constituted their joint estate should be divided, they sometimes find it difficult to divide such assets post their divorce.⁴⁵ It is also possible that the portion of the pension interest which the non-member spouse is entitled to may take a while to be paid out,

⁴⁴ *Old Mutual Life Assurance Company (SA) Ltd v Swemmer* 2004 ZASCA 140 (18 March 2004) para 19; *De Kock v Jacobson* 1999 4 SA 346 (W) 348J-349B.

⁴⁵ *Mmampane v Mmampane nee Moshitola* 2015 ZAGPPHC 420 (29 May 2015) para 1; *Kgopane v Kgopane* 2012 ZANWHC 58 (16 August 2012).

and this might necessitate such a non-member spouse to approach the courts to compel such a payment. One of the challenges relating to the law regarding pension interest was whether a former non-member spouse retained his or her right post divorce to claim the portion of his or her former member spouse's pension benefits post the parties' divorce, where he or she failed to claim the pension interest during the divorce proceedings. This question raises two separate questions. The first sub-question is whether or not there is a time limit within which the non-member spouse should claim the former non-member spouse's pension interest post the parties' divorce. The second sub-question is whether or not the former non-member spouse post the parties' divorce can claim a portion of his or her former member spouse's pension benefits when the former member spouse has already received such benefits.

With regard to the first sub-question, in *Kgopane v Kgopane*⁴⁶ the parties were married in community of property and divorced in 2001, the year wherein the division of the joint estate as ordered.⁴⁷ In this case, the divorce papers were silent on the issue of pension interest.⁴⁸ It appears that the parties post their divorce agreed between themselves that the former non-member spouse would receive a portion of the member spouse's pension interest, and approached the court in 2011 in order to enforce that agreement. The court held that:

(w)here the parties after the date of divorce enter into an agreement concerning the pension interest or appoint a liquidator with the powers to determine the value of the pension interest for purposes of division, this is done at the parties' own peril ... and in those circumstances where the pension fund refuses to give effect to an agreement after the divorce order was granted, the parties may seek recourse against each other.⁴⁹

In this case, the court held that the former non-member spouse was not entitled to an order directing the fund to pay to her a portion of her former member spouse's pension interest.⁵⁰ The SCA in *Ndaba v Ndaba* was not confronted with this issue and did not comment on how it should be approached. As such, this remains one of the aspects of the law relating to pension interest which remains unsettled. In particular, it remains uncertain as to how long a former non-member spouse should wait to claim his or her share of his or her former member spouse's pension benefits. This is an

⁴⁶ *Kgopane v Kgopane* 2012 ZANWHC 58 (16 August 2012) (hereafter *Kgopane v Kgopane*).

⁴⁷ *Kgopane v Kgopane* para 2.

⁴⁸ *Kgopane v Kgopane* para 19.

⁴⁹ *Kgopane v Kgopane* para 20.

⁵⁰ *Kgopane v Kgopane* para 21.

important consideration, because the *ratio* in *Ndaba v Ndaba* is that the fact that the non-member spouse failed to claim his or her portion of the pension interest upon divorce does not forever preclude him or her from claiming such pension interest post the divorce.⁵¹ Does the fact that the non-member spouse is entitled to such a benefit allow him or her to claim the benefit at any time after the divorce? This is a question which will hopefully be answered by the SCA in future, more particularly in the light of the need for a clean break between the divorcing parties generally.

With regard to the second sub-question, in *Peters v Peters*⁵² the parties were married to each other in community of property but divorced in 1996. In 2011 the former non-member spouse launched an application seeking an order that she be paid half of her former member spouse's pension interest, which benefits had already been paid to the non-member spouse in 1996.⁵³ As such, she sought an order directing her former member spouse to pay to her that amount. In *Kotze v Kotze*⁵⁴ the parties were married in community of property but divorced in 2005. In 2012 the former non-member spouse launched an application seeking an order declaring that she was entitled to half of her former member spouse's pension benefits valued as at the date of the parties' divorce, which application was dismissed by the single judge, whereafter she appealed to the full bench.⁵⁵ The former member spouse had already retired from his employment and in 2011 had been paid his pension benefits by his pension fund.⁵⁶ The divorce papers tabled during the divorce proceedings and the divorce decree were silent on the issue of the pension interest.⁵⁷ The non-member spouse in her founding papers contended that she had heard only subsequent to the divorce that her former husband was a retirement fund member, and further that the attorneys who represented her in the divorce proceedings did not advise her of her claim to a share in the pension interest.⁵⁸ The husband argued that he had told his former wife about his pension fund and that she deliberately chose not to make a claim for her portion of his pension interest in her divorce papers.⁵⁹ It seems that the court was convinced that despite the fact that the non-member spouse had not pleaded for the pension interest and despite the fact that the court had not made an order relating

⁵¹ *Ndaba v Ndaba* para 31.

⁵² *Peters v Peters* 2008 ZAWCHC 309 (2 December 2008) (hereafter *Peters v Peters*).

⁵³ *Peters v Peters* para 2.

⁵⁴ *Kotze v Kotze* 2013 JOL 30037 (WCC) (*Kotze v Kotze*).

⁵⁵ *Kotze v Kotze* para 1.

⁵⁶ *Kotze v Kotze* para 7.

⁵⁷ *Kotze v Kotze* para 9.

⁵⁸ *Kotze v Kotze* para 8.

⁵⁹ *Kotze v Kotze* para 10.

to the pension interest, nonetheless the non-member spouse was entitled to claim such pension interest. This is evidenced by the court's reasoning—

... 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 remains 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 1979.⁶⁰

Kotze v Kotze was unfortunately criticised by Davey, who incorrectly argued that this—

... judgment is erroneous and that the correct legal position is that, although a pension interest is deemed to be part of the assets that constitute the patrimonial benefits of a marriage, a non-member spouse only becomes entitled to such a share thereof as a court may assign in terms of s 7(8).⁶¹

Davey further erroneously in my view argued that:

[w]hile it is correct that a pension interest is deemed to be part of the assets of a joint estate and must be taken into account when the joint estate is divided, I submit that s 7(7)(a) does not provide any basis for the finding that if the spouses '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' the non-member spouse automatically becomes entitled to 50% of the member spouse's pension interest.⁶²

Davey's argument seems to suggest that section 7(7)(a) of the *Divorce Act* merely provides a temporary procedure to facilitate the parties claim only for the period of the divorce proceedings. This would mean that should the parties fail to dispose of their pension interest claims as at the date of divorce, they should be forever barred from claiming that which they failed to claim during the period of their divorce proceedings. This argument is ignorant of the implications of the word 'entitlement' and its role in the interpretation of section 7(7) of the *Divorce Act* post the parties' divorce generally, as discussed above.⁶³ According to Davey, the only way in which a non-member spouse can be entitled to a portion of the member's spouse's pension interest is when the court granting the divorce makes an order in terms of section 7(8) of the *Divorce Act*, wherein the retirement fund would

⁶⁰ *Kotze v Kotze* para 32.

⁶¹ Davey 2013 *De Rebus* 27.

⁶² Davey 2013 *De Rebus* 27.

⁶³ See fn 19 above.

be ordered to pay the portion to the non-member spouse.⁶⁴ Petse JA in *Ndaba v Adaba* correctly rejected Davey's argument when he held that:

I do not agree with these sentiments for the following reasons. First, s[ection] 7(7)(a) is self-contained and not made subject to s[ection] 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[ection] 7(7)(a) decrees.⁶⁵

Petse JA in *Ndaba v Ndaba* generally agreed with Saldanha J in *Kotze v Kotze* that notwithstanding the fact that the division of the joint estate had already been completed, the non-member spouse is entitled to a share of the pension benefit which had accrued to his or her member spouse.⁶⁶ However, Petse JA held that Saldanha J erred by concluding that "it was competent to grant an order in terms of s[ection] 7(7)(a) of the Act after the parties' joint estate had already been divided in accordance with the order granting the divorce".⁶⁷ Petse JA did not elaborate on what he meant on this point. It is not clear whether Petse JA's dictum in this regard is to the effect that if the decree of divorce ordered the division of the joint estate and all the assets comprising the joint estate are subsequently shared by the parties but only failed to share the pension benefits, the former non-member spouse would be precluded from claiming the portion of the unshared pension benefits. Or is the effect of Petse JA's dictum that when the pension benefits have already been paid to the member spouse by his or her pension fund after the divorce, that would preclude the non-member spouse from claiming a portion thereof? If indeed Petse JA relates to the latter point, I am not convinced by his reasoning and thus in respectful disagreement. It is submitted that the second sub-question relating to claiming already-paid pension benefits discussed herein is also unsettled and is likely to be subject to future litigation.

I submit further that *Kotze v Kotze* was correctly decided, and given the fact that the non-member spouse is entitled to claim his or her member spouse's pension interest, such a claim should not be disturbed by the fact that post-

⁶⁴ Davey 2013 *De Rebus* 27.

⁶⁵ *Ndaba v Ndaba* para 25.

⁶⁶ *Ndaba v Ndaba* para 22.

⁶⁷ *Ndaba v Ndaba* para 22.

divorce the member spouse's pension fund has already paid pension benefits to its member. A claim in terms of section 7(7) of the *Divorce Act* is not against the pension fund *per se* but the member of the pension fund. It is just that the member's benefits are held by the pension fund. As such, the mere fact that the pension fund has released the pension benefits to its member does not extinguish the non-member's entitlement to such benefits. At the very least, the non-member spouse retains his or her right to claim the portion which he or she ought to have received as at the date of divorce directly against the member.

3 Conclusion

In this note I have highlighted the importance of the SCA's judgment of *Ndaba v Ndaba* to the interpretation of particular aspects of the law relating to pension interest in South Africa which this judgment has settled. I have also indicated that despite this welcomed judgment, there are still aspects of this area of law which need judicial or legislative clarification. As the law currently stands, whether or not the court makes an order in terms of section 7(8) of the *Divorce Act*, the non-member spouse still retains his or her right to claim the value of the pension interest as it was at the date of the divorce, if he or she did not claim it before the divorce.

In *Ndaba v Ndaba* Petse JA was of the view that—

... 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.⁶⁸

While this is not explicit from the judgment itself, it is submitted that the majority judgment written by Petse JA' can be understood or rather interpreted as saying that there is no need for divorce litigants to specifically plead and pray for an order relating to the pension interest. Further, that whether or not the court makes an order in terms of section 7(8) of the *Divorce Act*, if one of the parties to the marriage in community of property is a member of a pension fund then his or her non-member spouse should be paid a portion of his or her pension interest. More particularly, if the court orders a division of the joint estate in marriages in community of property or even where the accrual system is applicable that in itself would also cover the pension interest which should be claimed in the circumstances.

⁶⁸ *Ndaba v Ndaba* para 25.

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List of Abbreviations

PELJ	Potchefstroom Electronic Law Journal
SCA	Supreme Court of Appeal