



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 689/2010

In the matter between:

ESKOM PENSION AND PROVIDENT FUND

Appellant

and

**KRUGEL ELIZABETH MARIA
DE LA REY EM N.O.**

**First Respondent
Second Respondent**

Neutral citation: *Eskom Pension and Provident Fund v Krugel* (689/10) [2011]
ZASCA 96 (31 May 2011)

Coram: BRAND, LEWIS, MAYA, TSHIQI JJA AND PETSE AJA

Heard: 16 May 2011

Delivered: 31 May 2011

Summary: Pension – divorce proceedings – ss 7(7) and 7(8) of the Divorce Act 70 of 1979 – order in respect of ‘pension interest’ – whether applicable to a member of a pension fund who resigns from his employment before his divorce.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Lamont J sitting as court of review):

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and replaced with the following:

‘The second respondent’s determination under reference number PFA/GA/10192/2006/SM made, on 11 December 2009, in terms of s 30M of the Pension Funds Act 24 of 1956 in respect of the complaint lodged by the first respondent is set aside and replaced with an order dismissing the first respondent’s complaint.’

JUDGMENT

MAYA JA (BRAND, LEWIS, TSHIQI JJA AND PETSE AJA concurring):

[1] This is an unopposed appeal against the judgment of the South Gauteng High Court, Johannesburg (Lamont J). In that judgment, the court below dismissed an application brought in terms of s 30P of the Pension Funds Act 24 of 1956 (the Pension Funds Act) for the review of the second respondent’s determination which ordered the appellant (the Fund) to endorse its records to give effect to certain provisions of a divorce order dissolving the first respondent’s marriage to Mr PJ Krugel, a former employee of Eskom and a member of the Fund.

[2] Krugel resigned from Eskom on 31 January 1993. Upon his resignation, he

elected to defer his pension benefit in the Fund in accordance with Rule 30(2)¹ of the Fund's rules and thus became a deferred pensioner.² He and the first respondent were divorced on 14 September 2001. A settlement agreement which they concluded and was made an order of court recorded, inter alia, that

'[Krugel] is a member of a pension fund and has a pension interest in the Eskom Pension Fund. The parties have agreed that the first respondent is entitled to 25% (twenty five per cent) of [Krugel's] pension interest with Eskom Pension Fund as calculated on date hereof, payable to the [first respondent] as soon as [Krugel] becomes entitled to the pension benefits. [Krugel's] attorneys, SHAPIRO & DE MEYER INC, will secure the registration of an endorsement against the records of the aforementioned pension fund, in order to register the above provision against it. [Krugel] undertakes to give on demand any assistance needed in connection with the above.'³

[3] However, when approached, the Fund refused to register the required endorsement against its records on the basis that the divorce was granted after Krugel had already elected to become a deferred member and no longer had a pension interest in the Fund as contemplated in the Divorce Act 70 of 1979 (the Divorce Act), read together with s 37D of the Pension Funds Act. This prompted the first respondent to lodge a complaint in terms of s 30A of the Pension Funds Act which allows the lodgement of written complaints with the Fund for consideration by its board and, if the board does not resolve a complaint satisfactorily, by the Pension Funds

¹ Rule 30(2) of the Fund rules dated 11 June 1999 deals with a member's resignation from service and provides: 'If a member becomes entitled to a benefit in terms of this rule, he may elect instead that the board shall pay to him an amount not exceeding the amount which can be taken as a tax-free withdrawal benefit in terms of the Income Tax Act, and that the excess of the actuarial value in respect of his service, as determined by the actuary, over the amount so paid be deemed to be a voluntary contribution made by him on the date of leaving the service.'

² The Fund rules define a deferred pensioner as 'a former member who has elected to defer the payment of his benefits in terms of Rules 28, 29 or 30 to a future date which falls between his fifty and sixty fifth birthday.'

³ Translated from the Afrikaans text which reads:

'Eiser is 'n lid van 'n pensioenfonds en het 'n pensioenbelang in die Eskom Pensioenfonds. Die partye kom ooreen dat verweerderes geregtig is op 25% (vyf en twintig persent) van die Eiser se pensioenbelang by Eskom pensioenfonds, bereken soos op datum hiervan, en aan die verweerderes betaalbaar sodra die pensioenvoordele die eiser toekom en/of toeval. Die eiser se prokureurs, SHAPIRO + DE MEYER ING, sal toesien tot die registrasie van 'n endossement teen die rekords van voormelde pensioenfonds om die bepaling hierbo daarteen te registreer. Die eiser onderneem om alle

Adjudicator.

[4] The second respondent, relying on the provisions of s 37D (6) of the Pension Funds Act, found that the provisions of s 37D(4) (d) – which deem the accrual date to a member of ‘any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce’ – include a deferred or preserved benefit to be regarded as pension interest capable of being shared upon divorce’ and that the fact that Krugel’s ‘benefit was deferred or preserved until the age of 55 does not affect the right of the non-member spouse to obtain her share as at the date of divorce’. She concluded that the benefit was deemed, in terms of s 37D (4)(a) of the Pension Funds Act, to have accrued to the member spouse on the date on which the decree of divorce was granted. Thus, she upheld the complaint and made an order against the Fund in terms of which it was ordered to pay the first respondent or transfer her portion of the pension interest to a pension fund (depending on her election) in terms of s 37D (4)(b)(i) and (iii) of the Pension Funds Act.

[5] The Fund was not satisfied with the second respondent’s determination and, in challenge, launched a s 30P application, the result of which is the subject of this appeal. The court below upheld the second respondent’s findings and conclusion. It found that the legislature, by virtue of the provisions of the Divorce Act, intended the widest definition, to the exclusion of the one provided by the Fund’s rules, of the term ‘member’ of a pension fund which it said meant ‘a person who possesses a right to an asset in that fund’. The court found further – on the basis of s 37D (6) which it said ‘purports to vary the definition of ‘pension interest’ in the Divorce Act . . . to limit the fund . . . created to the period terminating on the date the decree of divorce is granted’ – that ss 7(7) and 7(8) impliedly provide a formula by which an asset comprising a pension benefit can be determined. The court then held that Krugel ‘was a member of the pension fund at all material times and that there was an existing asset

which fell to be divided 25% to the first respondent and 75% to her husband’.

[6] The crisp issue on appeal, which is with the leave of the court below, is whether the provisions of ss 7(7) and 7(8) of the Divorce Act entitle a non-member spouse⁴ to receive benefits from a pension fund of which the other spouse is a member pursuant to a divorce order where the member spouse had resigned from his employment before the date of divorce but deferred his benefit in the pension fund.

[7] Counsel for the Fund contended that on a proper interpretation of ss 7(7) and 7(8) of the Divorce Act, there was no pension interest which formed part of Krugel’s assets which could be assigned to the first respondent. This was so, it was argued, because Krugel had already resigned from his office on the date of divorce. His pension interest had become payable to him before the divorce and he was, furthermore, no longer a member of the Fund.

[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.⁵ Relevant for present purposes is s 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

⁴ ‘Non-member spouse’ is defined in s 1(1) of the Pension Funds Act as meaning ‘a person who is no longer the spouse of that member due to the dissolution or confirmation of the dissolution of the relationship by court order and to whom the court ordering or confirming the dissolution of the relationship has granted a share of the member’s pension interest in the fund.

⁵ See Hunter, Esterhuizen, Jithoo and Khumalo *The Pension Funds Act: A commentary* 2010 1 ed at 662.

dissolution of a customary marriage is granted’.

[9] The first respondent’s entitlement, if any, must therefore derive from the provisions of ss 7(7) and 7(8) of the Divorce Act, which deal with the pension benefits of a divorcing member of a pension fund. The subsections⁶ 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) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund –

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that –

- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;
- (ii) 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;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.’

⁶ Inserted by s 2 of the Divorce Amendment Act 7 of 1989.

[10] ‘Pension interest’ and ‘pension fund’ are defined in s 1(1) of the Divorce Act, as amended by s 1(1) of the 1989 Act, as follows:

“‘pension fund’ means a pension fund as defined in s 1(1) of the Pension Funds Act 24 of 1956, irrespective of whether the provisions of that Act apply to the pension fund or not’;

“‘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) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party’s contributions to the fund up to the date of divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed rate of Interest Act, 1975, for the purposes of that Act’.

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

⁷ *Old Mutual Life Assurance Co (SA) Ltd v Swemmer* 2004 (5) SA 373 (SCA) para 18.

⁸ *Government Employees Pension Fund v Naidoo* 2006 (6) SA 304 (SCA) para 1.

benefit, the provisions of ss 7(7) and 7(8) are no longer applicable.⁹

[12] Here, as indicated above, Krugel resigned from his job at Eskom on 31 January 1993, long before his divorce. His pension interest, which is a benefit determinable only at the time of an employee's resignation, had already become payable to him before the divorce. Clearly, he could not again be deemed to become entitled to a resignation benefit. He simply no longer had a pension interest for purposes of ss 7(7) and 7(8) of the Divorce Act and s 37D(4)(a) of the Pension Funds Act, which is specifically designed for purposes of section 7(8)(a). An order premised on the terms of these provisions, therefore, was not competent.

[13] It seems to me that the reliance placed on the provisions of the provisions of s 37D(6) was equally misplaced. The section reads:

'Despite paragraph (b) of the definition of "pension interest" in section 1(1) of the Divorce Act, 1979, the portion of the pension interest of a member of a pension preservation fund or provident preservation fund (as defined in the Income Tax Act, 1962), that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled in terms of the rules of the fund if his or her membership of the fund terminated on the date on which the decree was granted.'

[14] It is plain from the wording of these provisions that they are intended to cater only for 'pension interest' of a member of a preservation fund. As was pointed out in the unchallenged affidavit filed in support of the appellant's application in the court below, it was not established in the first respondent's complaint that Krugel was a member of a preservation fund. It was contended that to have become a member of a preservation fund (which is a different legal entity from a pension or provident fund as appears in its definition in the Income Tax Act), Krugel would have had to transfer all his pension assets and liabilities from the pension fund to a preservation fund that

⁹ *Ibid*, fn 8; *De Kock v Jacobson* 1999 (4) SA 436 (W) at 349 F-G.

he would have then joined as a member and that this was not shown to have occurred. I agree. But there is, I think, a more compelling reason to discount the applicability of these provisions. It must be borne in mind that the definition of 'pension interest' in paragraph (b) of subsection 1(1) of the Divorce Act, which s 37D(6) seeks to extend, is wholly irrelevant for present purposes. As illustrated above, it is the definition of 'pension interest' contained in paragraph (a) thereof which is of application to the facts of this matter. And the effect of that definition on those facts has been dealt with above. The essence of the first respondent's difficulty remains that at the date of her divorce no pension interest remained as Krugel had already 'resigned from office' as described in paragraph [12].

[15] Finally, it should be mentioned that this finding does not leave the first respondent without remedy. The divorce settlement agreement between her and Krugel (who undertook to give on demand any assistance needed in connection with its enforcement) remains binding. It is therefore open to her to claim her share of his deferred pension benefit when it is claimed by him after reaching the age of 55 years.

[16] It follows that the appeal succeeds. The appellant sought no order of costs both on appeal and in the proceedings below which were also unopposed. None, therefore, shall be made. Accordingly, the following order is made:

1 The appeal is upheld with no order as to costs.

2 The order of the court below is set aside and replaced with the following:

'The second respondent's determination under reference number PFA/GA/10192/2006/SM made, on 11 December 2009, in terms of s 30M of the Pension Funds Act 24 of 1956 in respect of a complaint lodged by the first

respondent is set aside and replaced with an order dismissing the first respondent's complaint.'

MML Maya
Judge of Appeal

APPEARANCES

APPELLANT: P. Van Der Berg
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