THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 291/2017

In the matter between:

BS **APPELLANT**

and

PS **RESPONDENT**

Neutral citation: *BS v PS* (291/2017) [2018] ZASCA 37 (28 March 2018)

Coram: Lewis, Willis, Swain, Mathopo and Mocumie JJA

Heard: 9 March 2018

Delivered: 28 March 2018

Summary: Divorce Act 70 of 1979 – s 7(8)*(a)*(i) – 50 per cent of respondent's pension interest in Government Employees Pension Fund assigned to appellant – Matrimonial Property Act 88 of 1984 – s 10 – deferral of payment of pension interest – precluded in terms of s 24A of Government Employees Pension Law, 1966.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Bloem J sitting as court of first instance):

1 The appeal succeeds with costs.

2 Paragraphs 28.3 to 28.7 inclusive of the order of the court a quo are set aside and replaced with the following order:

'(a) The defendant is ordered to make payment of the amount of R433 000 to the plaintiff in satisfaction of the plaintiff's accrual claim in respect of the matrimonial home.

(b) The Government Employees Pension Fund (the Fund) is ordered in terms of s 7(8)*(a)*(i) of the Divorce Act 70 of 1979, read together with s 24A of the Government Employees Pension Law, 1966 (the GEPL) to make payment to the plaintiff in accordance with the provisions of the GEPL, of 50 per cent of the defendant's pension interest calculated in accordance with the rules of the Fund, as at the date of the decree of divorce, being 1 November 2016, which is assigned to the plaintiff.

(c) The registrar of the court a quo is directed in terms of s 7(8)*(a)*(ii) of the Divorce Act 70 of 1979, to forthwith notify the Fund that pending compliance by the Fund with the provisions of paragraph (ii) above, an endorsement be made in the records of the Fund that 50 per cent of the pension interest of the defendant is payable to the plaintiff, and that the administrator of the Fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification.

(d) The defendant is ordered to pay the plaintiff's costs.'

JUDGMENT

Swain JA (Lewis, Willis, Mathopo and Mocumie JJA concurring):

[1] The issues for determination in this appeal are first whether the Eastern Cape Division of the High Court (Bloem J), correctly granted an order for the partial forfeiture of the benefits of a marriage out of community of property but subject to the accrual system, against the appellant, Ms BS, in an action instituted by her against the respondent, Mr PS, for a decree of divorce and ancillary relief. Secondly, whether Bloem J correctly ordered that payment of the pension benefit to the appellant be deferred.

[2] It was common cause before the court a quo that:

(a) The marriage had irretrievably broken down and a decree of divorce should be granted.

(b) The parties had declared in their antenuptial contract that the net values of their respective estates at the commencement of their marriage were 'nil'.

(c) The estate of the appellant had not shown any accrual during the marriage.

(d) The estate of the respondent had shown an accrual in respect of two assets. First, the matrimonial property valued at R1 450 000 with a bond over the property in an amount of R584 000, produced a net accrual of R866 000. Second, the pension interest of the respondent in the Government Employees Pension Fund (the Fund), was valued at R4 537 231.

[3] The portions of the order granted by the court a quo, which are relevant to the appeal, were as follows:

(a) In terms of s 9 of the Matrimonial Property Act 88 of 1984 (the Act), that the appellant forfeit 80 per cent of her right to share in the accrual of the estate of the respondent, in respect of these two assets.

(b) That the respondent pay the amount of R173 200 to the appellant within two months from the date of the order in satisfaction of the appellant's 20 per cent interest in the matrimonial property.

(c) That in respect of the appellant's 20 per cent pension interest in the respondent's pension benefits in the Fund, (calculated as at the date of the decree of divorce), payment to the appellant by the Fund was deferred in terms of s 10 of the Act, to the date when the pension benefits of the respondent in the Fund accrued to the respondent. The respondent was ordered to pay interest to the appellant, at the legal rate on the amount payable to the appellant by the Fund, from the date of the divorce to the date of payment.

(d) That the parties pay their own legal costs.

[4] The main reasons advanced by the court a quo for the order of partial forfeiture of the right of the appellant to share in the accrual of the estate of the respondent, were as follows:

(a) The turning point in the breakdown of the parties' marriage was when the appellant informed the respondent of her relationship with a certain Mr W. The court a quo concluded that the appellant had breached her moral obligation to the respondent and had thereby caused the breakdown in the marriage.

(b) The respondent had proved that the appellant would be unduly benefited if a partial forfeiture order was not granted. The court a quo reasoned that because the appellant contributed to a lesser degree in the accrual of the respondent's estate during the marriage, and because her conduct led to the breakdown in the marriage, she should be ordered to forfeit 80 per cent of her right to share in the accrual of the estate of the respondent. The appellant was therefore entitled to payment of the sum of R173 200 in respect of the matrimonial property, being 20 per cent of R866 000 and 20 per cent of the respondent's pension benefit in the Fund, calculated as at the date of divorce.

(c) Regard being had to the evidence that the monthly net income of the appellant and the respondent was respectively R59 000 and R20 000, and that the

appellant owned a motor vehicle but did not own a house, whereas the respondent owned a house but did not own a motor vehicle, deferral of the appellant's claim to share in the accrual of the pension benefit should be granted.

Reasons for the breakdown in the marriage

[5] On a conspectus of the evidence this was not a marriage made in heaven. Within two years of the parties' marriage on 1 July 1988 and again during 1996, the appellant was unfaithful to the respondent and left the marital home, but subsequently returned. The respondent for his part admitted that he was also unfaithful to the appellant at this time. The respondent admitted that they had argued a lot, that he was jealous of her, had accused her of having affairs with other men and that they swore and shouted at each other. He agreed there was no longer any love or affection between them and admitted that the appellant had obtained a protection order restraining him from verbally abusing her.

[6] The marriage was placed under considerable stress during 2014 when the respondent who is a Lieutenant Colonel and head of financial services in the South African Police Service, stationed at Aliwal North at the time, was advised that he was transferred to Port Alfred in the Eastern Cape. The respondent was excited by this as he wanted to retire to the coast. A move was however problematic for the appellant as she was employed on a yearly contract by First National Bank (FNB), and would have been obliged to repay R150 000, if she moved. She was the main breadwinner with a child (whom she supported) at university and would have had to start from scratch in Port Alfred.

[7] The respondent attempted to prevent his transfer, but was advised in December 2015 that his salary would be stopped if he did not accept the transfer. On 19 January 2016, after making further representations, he was ordered to give effect to his transfer within seven days.

[8] The respondent advised the appellant of this turn of events and on the following morning the appellant handed to him a letter. The contents of the letter are hotly disputed by the parties and neither the original nor a copy could be produced in court. The respondent maintains the appellant said she had met her soulmate three

days earlier, who it subsequently transpired was Mr W. The conclusion he drew from the letter was that the appellant refused to continue with the marriage. In his view, the appellant's affair with Mr W ended the marriage.

[9] The appellant denied she said this in the letter. She maintained she had said she wanted her freedom and could not continue with the marriage, because he was a tyrant who swore and shouted at her. She highlighted the problems in their marriage which had become so serious it could not be saved. The appellant asked the respondent to let her start a new life. According to the appellant, her affair with Mr W only started on 24 February 2015 and she later left the marital home at the beginning of April 2015. She denied this caused the breakdown of the marriage, maintaining that it was impossible to live with the respondent.

[10] The court a quo erred in concluding that the appellant caused the breakdown of the marriage. To place all the blame on the appellant was not justified by the evidence. The marriage was unhappy from an early stage, with both parties being guilty of infidelity. Insufficient weight was accorded to the marriage being placed under considerable strain by the respondent’s impending transfer and the justifiable inability of the appellant to accompany him. There was no evidence that the appellant had commenced an affair with Mr W when she handed the letter to the respondent, which was not produced in court. That the appellant wished to terminate an obviously unhappy marriage is not surprising.

The proprietary consequences of the marriage

[11] The respondent acknowledged that the appellant was very successful in her employment. They never spoke of ‘her money’ or ‘my money’ as they shared expenses. They originally had a joint account at Absa bank into which their income was deposited. According to the appellant they thereafter opened separate accounts at FNB, with each of them having access to both accounts. The respondent acknowledged that the appellant made a large contribution to the joint expenses of the household and that shortly before she left, was paying 80 per cent of their expenses.

[12] The respondent became a member of the Fund on 28 December 1982, when he joined the South African Police Service. The respondent's employer deducted his pension contributions and the balance of his salary was used for household expenses. He maintained that the appellant never contributed directly to his pension fund.

[13] As regards the matrimonial home, the bond repayments were deducted from the respondent’s salary. Although conceding they could be viewed as a joint expense, he again maintained that the appellant had not contributed directly to the bond repayment. The appellant, however, pointed out that the income she generated enabled the respondent to pay an increased bond instalment, and that they had agreed the respondent would pay for the medical aid and the house, and she would pay for the rest of their expenditure.

[14] The evidence again establishes that the court a quo erred in concluding that the appellant contributed to a lesser degree in the accrual of the respondent's estate. Counsel for the respondent was constrained to concede that the evidence did not support this finding by the court a quo. The respondent was only able to afford the deductions made from his salary in respect of the bond repayments on the matrimonial home, as well as his pension contributions to the Fund, because the appellant made a far greater contribution to their joint expenses.

[15] When due regard is had to the fact that the court a quo erred in concluding that the appellant caused the breakdown in the marriage and also erred in concluding that the appellant contributed to a lesser degree in the accrual of the respondent's estate, it should not have ordered the appellant to forfeit 80 per cent of her interest in the accrual of the respondent's estate. No forfeiture order should have been granted when sufficient weight is also accorded to the duration of the marriage of approximately 28 years and the evidence that the appellant does not own a home. In addition, no evidence was led on whether the appellant possesses a pension for her old age.

Deferral of the payment to the appellant in terms of s 10 of the Matrimonial Property Act 88 of 1984, of the portion of the respondent's pension interest

assigned to the appellant, in accordance with s 24A of the Government Employees Pension Law 1996 (GEPL)

[16] I turn to consider the order granted by the court a quo that payment to the appellant by the Fund, of the appellant's 20 per cent pension interest in the respondent's pension benefits in the Fund, (calculated as at the date of the decree of divorce), was deferred in terms of s 10 of the Act to the date when the pension benefits of the respondent in the Fund, accrued to the respondent. It is necessary to do so as the respondent supported the order of deferral granted by the court a quo.

[17] Whether the court a quo was entitled to grant an order of deferral requires an interpretation of the provisions of s 24A of the GEPL, read together with s 10 of the Act. The relevant portions of s 24A of the GEPL provide as follows:

'**24A Payment of pension interest upon divorce or dissolution of customary marriage.**

(1) The Board shall direct the Fund to reduce a member's pension interest by any amount assigned from the member's pension interest to the member's former spouse in terms of a decree of divorce granted under section 7(8)*(a)* of the Divorce Act, 1979 (Act 70 of 1979), or a decree for the dissolution of a customary marriage.

(2) *(a)* Subject to paragraph *(j)*, for purposes of section 7(8)*(a)* of the Divorce Act, 1979 …, the portion of a member's pension interest assigned to the member's former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or the decree for the dissolution of a customary marriage is granted.

(b) The amount of the member's pension interest in the Fund shall be determined and the amount of the member's pension interest that is assigned to the former spouse shall be calculated by the Fund in accordance with the rules as at the date of the decree of divorce or the decree for the dissolution of a customary marriage.

. . .

. . .

(e) The Fund shall, within 45 days of the submission of the court order by the former spouse of a member, request the former spouse to elect whether the amount to be deducted must be –

(i) paid directly to the former spouse; or

(ii) transferred to an approved retirement fund on behalf of the former spouse.

(f) The former spouse shall, within 120 days of being requested to make a choice-

(i) inform the Fund of the manner in which the amount referred to in paragraph *(e)* must be dealt with; and

(ii) if the former spouse chooses that the amount must be paid to the former spouse directly, provide the Fund with the details that are necessary to effect the payment; or

(iii) if the former spouse chooses that the amount must be transferred to an approved pension fund on his or her behalf, provide the Fund with the details of that approved retirement fund.

(g) The Fund shall pay or transfer the amount within 60 days of being informed of the manner in which the amount shall be dealt with in accordance with the former spouse's choice.

(h) In the event that the former spouse fails to make a choice or identify the approved retirement fund to which the amount should be transferred within the period referred to in paragraph *(f)*, the Fund shall pay the amount directly to the former spouse within 30 days of the expiry of that period.'

[18] In *Wiese v Government Employees Pension Fund & others* [2012] ZACC 5; 2012 (6) BCLR 599 (CC) paras 5-9, the Constitutional Court in dealing with the history and object of the amendment, analysed the legislative enactments that had preceded it and pointed out that:

'During 1989, section 7(7)(*a*) was added by the Divorce Amendment Act to deal with certain problems. Under the Divorce Act non-member spouses were, in certain circumstances, entitled to payment of part of the pension interest due, or assigned to, the member of the Government Pension Fund when any pension benefit accrued to that member. A pension interest which had not yet accrued was not considered an asset in the spouse's estate. To

cure this defect, the amendment, provided that a pension interest is deemed to be an asset in the estate for the purpose of determining patrimonial benefits.' (Footnotes omitted.)

[19] The problem, however, that still remained was:

'. . . the question of when payment of a pension interest should occur. Generally, this depended on the rules of a specific fund but usually took place on retirement, dismissal or some other defined "exit event". The problem was that a non-member spouse would be severely prejudiced if the value of his or her benefit was frozen at the date of divorce and the beneficiary would have had to wait for a later exit event.'

[20] The Constitutional Court noted that in order to cure this defect, various amendments were made to the Pension Funds Act 24 of 1956 (PFA) which introduced the 'clean-break' principle. The result was that:

'. . . the non-member spouse no longer has to wait for an exit event to occur. This means that a pension benefit awarded to a non-member spouse in terms of the Divorce Act is deemed to have accrued on the date of the divorce. This demonstrates the interplay between the Divorce Act and the PFA.'

[21] The Constitutional Court noted that there was an oversight in that these amendments only applied to the PFA and the Government Pension Fund could not benefit from the 'clean-break' principle as it was governed by its own statute. The introduction of s 24A of the GEPL, by way of s 3 of the GEPL Amendment Act 19 of 2011, cured this oversight and introduced the 'clean-break' principle which:

'. . . authorises the Government Pension Fund to make payment of a pension interest upon divorce or dissolution of a customary marriage.'

[22] The clear object of the amendment is to ensure that the non-member spouse receives payment of the amount assigned from the member's pension interest in terms of a decree of divorce, without delay and within the statutorily defined periods, after the grant of the order. The peremptory provisions of s 24A(2)*(e)*, *(f)*, *(g)* and *(h)* of the GEPL ensure attainment of this objective in that:

(a) The Fund is obliged within 45 days of the submission of the court order by the former spouse of a member, to request the former spouse to elect whether payment is to be made directly to the former spouse, or to an approved retirement fund on behalf of the former spouse.

(b) The former spouse is obliged, within 120 days of being requested to make this choice, to inform the Fund of the manner in which payment must be made.

(c) The Fund is obliged within 60 days to make payment in accordance with this choice. In the event that the former spouse fails to make a choice within 120 days, the Fund is obliged to make payment directly to the former spouse within 30 days of the expiry of that period.

[23] Accordingly, the issue for determination is whether the provisions of s 24A of the GEPL oust the jurisdiction of a court to grant deferment of satisfaction of an accrual claim (in the form of payment of the amount assigned from the member's pension interest in terms of a decree of divorce) in terms of s 10 of the Act. The section provides as follows:

'**10 Deferment of satisfaction of accrual claim**

A court may on the application of a person against whom an accrual claim lies, order that satisfaction of the claim be deferred on such conditions, including conditions relating to the furnishing of security, the payment of interest, the payment of instalments, and the delivery or transfer of specified assets, as the court may deem just.'

[24] As stated in *De Wet v Deetlefs* 1928 AD 286 at 290:

'It is a well recognised rule in the interpretation of statutes that, in order to oust the jurisdiction of a court of law, it must be clear that such was the intention of the Legislature.'

In my view, the clear intention of the legislature in enacting s 24A of the GEPL was to oust the jurisdiction of a court to grant deferment of satisfaction of an accrual claim, in the form of payment of the amount assigned from the member's pension interest in terms of a decree of divorce, for the reasons that follow.

[25] The deeming provision contained in s 24A(2)*(a)* of the GEPL, that the portion of a member's pension interest assigned to the member's former spouse in terms of a decree of divorce, is deemed to accrue to the member on the date of the grant of the order, may be described as 'conclusive or irrebuttable' rather than 'merely prima facie or rebuttable' (*S v Rosenthal* 1980 (1) SA 65 (A) at 75-76). This is because it serves as the basis for a determination by the Fund in terms of s 24A(2)*(b)*, of the amount of the member's pension interest in the Fund, as well as the amount of the

member’s pension interest that is assigned to the former spouse, as at the date of the decree of divorce.

[26] The provision of peremptory defined periods, commencing on the presentation of the order to the Fund by the non-member spouse, to ensure payment without delay of the amount so determined by the Fund, which has to be assigned from the member’s pension interest in terms of the order, is irreconcilable with the power to defer payment. Deferral of payment would defeat the object of the section.

[27] As pointed out by the Constitutional Court in *Wiese*, the object of s 24A of the GEPL was to introduce the ‘clean-break’ principle with regard to the payment of the amount assigned from the member’s pension interest to the non-member spouse, in a decree of divorce. A deferral of payment would also defeat this objective.

[28] Accordingly, the court a quo erred in ordering that payment to the appellant by the Fund of the appellant's 20 per cent pension interest in the respondent’s pension benefits in the Fund (calculated as at the date of the decree of divorce), be deferred in terms of s 10 of the Act to the date when the pension benefits of the respondent in the Fund, will accrue to the respondent.

[29] As the only issue before the court a quo was whether the appellant should forfeit the patrimonial benefits of the marriage and the appellant has been successful on this issue, there can be no reason why the respondent should not be ordered to pay the costs of the appellant incurred in the court a quo and on appeal.

[30] The following order is granted:

1 The appeal succeeds with costs.

2 Paragraphs 28.3 to 28.7 inclusive of the order of the court a quo are set aside and replaced with the following order:

‘(a) The defendant is ordered to make payment of the amount of R 433 000 to the plaintiff in satisfaction of the plaintiff's accrual claim in respect of the matrimonial home.

(b) The Government Employees Pension Fund (the Fund) is ordered in terms of s 7(8)*(a)*(i) of the Divorce Act 70 of 1979, read together with s 24A of the Government Employees Pension Law, 1966 (the GEPL) to make payment to the plaintiff in accordance with the provisions of the GEPL, of 50 per cent of the defendant's pension interest calculated in accordance with the rules of the Fund, as at the date of the decree of divorce, being 1 November 2016, which is assigned to the plaintiff.

(c) The registrar of the court a quo is directed in terms of s 7(8)*(a)*(ii) of the Divorce Act 70 of 1979, to forthwith notify the Fund that pending compliance by the Fund with the provisions of paragraph (ii) above, an endorsement be made in the records of the Fund that 50 per cent of the pension interest of the defendant is payable to the plaintiff, and that the administrator of the Fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification.

(d) The defendant is ordered to pay the plaintiff's costs.'

K G B Swain
Judge of Appeal

Appearances:

For the Appellant:	J L Olivier
	Instructed by:
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For the Respondent:	P Jooste (with T Rossi)
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