

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GRAHAMSTOWN)**

**Case No: CA174/2019**

In the matter between:

**MAKHOSANDILE ERIC MATUNDU**

**Appellant**

And

**THOBEKA CLEOPATRA MATUNDU**

**Respondent**

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**APPEAL JUDGMENT**

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**BESHE J:**

[1] In the application that served before the court *a quo*, the appellant sought an order directing the respondent to pay 50% of her pension interest to him. The application was dismissed with costs. He is now appealing against the dismissal of the application, leave to do so having been granted by the court *a quo*.

**Proceedings before the Regional Court**

[2] The applicant and the respondent were married to each other in community of property. Their marriage was dissolved by an order that was issued by the Regional Court sitting in Queenstown on the 22 August 2017. The order issued by the Regional Court was the following:

**IT IS ORDERED**

1. That Decree of divorce is granted incorporating the following orders:
  - (a) Division of the joint estate on the following bases.
  - (b) Movable property divided on each party retains the movable assets presently in their possession.
  - (c) The immovable property will be sold at a mutually agreed market related amount and the proceeds be shared equally by both parties.

- (d) Each party to pay their own costs.
- (e) Full parental rights and responsibilities of their minor children born out of the marriage awarded to both parties jointly.
- (f) Primary care residence of the minor children awarded to Defendant as per exhibit B and reasonable access to Plaintiff.
- (g) Guardianship of the minor children awarded to each party equally.

**[Reproduced as it is]**

The order was subsequently varied as follows on the 7 November 2017:

**IT IS ORDERED**

1. That Decree of divorce is granted amending the order dated 22<sup>nd</sup> August 2017 to read:
  - (i) The care of the minor child born of the marriage between the parties in terms of Section 18(2) of the Children's Act 28 of 2005, be vested solely on the Plaintiff subject to the Defendant's right of contact at all reasonable times.
  - (ii) The Defendant is ordered to pay 30% of his pension interest held with the Government Employees Pension Fund with pension Number:97594364. The records of the GEPF be endorsed to reflect the Plaintiff's entitlement to 30% of defendant's pension interest held with the Government Employees Pension Fund.
  - (iii) No order as to costs.

[3] The appellant was the defendant during the divorce proceedings. He filed a notice to defend the divorce action. This was followed by a plea and a counter-claim. In his plea, he denied that respondent was entitled to 50% of his pension interest. In the counter-claim, he sought an order that respondent forfeits the patrimonial benefits arising out of the marriage in his favour, specifically:

plaintiff's rights in defendant's pension benefits in the Government Pension Fund;

plaintiff's rights and interest in the immovable property described.

He also sought an order directing the respondent's pension fund (GEPS) to pay 50% of respondent's pension interest to him. In her plea to appellant's counter-

claim, respondent admitted that the respondent was entitled to 50% of her pension interest.

[4] This was followed by the filing of a notice by the appellant to settle in terms of *Rule 18 of the Magistrate's Court Act*.<sup>1</sup> It will be apposite to reproduce the terms of the settlement that were proposed by the appellant:

**NOW THEREFORE** the Defendant unconditionally agrees to settle the issue in question, with each party to pay his / her own costs, on the following terms:

1. The Defendant shall withdraw his defence and counterclaim upon settlement upon the terms set out herein and the Plaintiff will proceed to obtain a decree of divorce within 1 month of such settlement, or such further period as may be agreed upon.
2. It is recorded that the Defendant is presently paying maintenance in accordance his means and ability.
3. There is one minor child born of the marriage between the parties, namely Ovayo Matundu, a daughter, born on 10 May 2000.
4. It will be in the interest of the minor child born of the marriage between the parties:
  - 4.1 that the care of the minor born of the marriage as envisaged in terms of Section 18(2) of the Children's Act 28 of 2005, be vested solely in the Plaintiff, subject to the defendant contact right of contact at all reasonable times;
  - 4.2 that the other parental rights and responsibilities as envisaged in terms of Section 18(2) of the Children's Act 28 of 2005 be awarded to the parties jointly;
  - 4.3 that both parties are proportionately liable for the maintenance of the minor child.
5. The provision of Section 6(5) of the Children's Act 28 of 2005 have been applied in that the child has participated during the arrangements.
6. The Defendant agrees to pay to the Plaintiff 30% of his Pension Fund interest held at the Government Employees Pension Fund as at date of divorce.
7. The defendant agrees that the joint estate be divided on the basis that each party retains the moveable property in his / her possession, save to exclude the immovable property. The Defendant agrees that the immovable property be sold at a mutually

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<sup>1</sup> Act 32 of 1944 as amended. The Rule provides that: **Offer to settle**

(1) (a) In any action in which a sum of money is claimed, either alone or with any other relief, the defendant may at any time unconditionally or without prejudice make an offer in writing to settle the plaintiff's claim.

agreed market related amount and that the proceeds be shared equally by both parties.

[5] The offer of settlement was accepted by the respondent. This was followed by respondent's approach to court for a decree of divorce which resulted in the orders mentioned earlier in this judgment. Both orders made no reference to the incorporation of the settlement agreement between the parties.

### **Proceedings in the court *a quo***

[6] The basis for the application in the court *a quo* was that even though the divorce order was silent in regard to his share of the respondent's pension interest, the appellant was entitled to 50% thereof.

[7] This was countered by the respondent on the ground that the appellant had made an unconditional offer to settle to her, which she accepted. In the said offer, appellant did not show any interest in her pension interest. She also suggested that the settlement agreement was incorporated into the court order that decreed their divorce.

[8] In its judgment, the court *a quo* acknowledged that the Regional Court order does not reflect that there was a settlement agreement entered into between the parties. That the respondent did not produce a copy of the said agreement. The court nonetheless found that the matter was settled in the terms proposed by the appellant in the offer to settle. Which in turn was accepted by the respondent. The court further found that the decision relied upon by the appellant as authority for his claim, the **GN v JN**<sup>2</sup> matter does not assist him. This in view of the fact that in **GN v JN's** matter, unlike in his matter, there was no division of the joint estate. Further, that withdrawal of the counter-claim in which appellant had claimed 50% of respondent's pension interest as well as the terms dealing with the assets of the joint estate, must be interpreted to mean that the settlement dealt with the division of the parties' joint estate.

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<sup>2</sup> 2017 (1) SA 342 SCA [31].

## **Submissions on Appeal**

[9] The decision of the court is assailed on the following grounds:

1. This Honourable Court erred in finding that the litigation between the applicant and the respondent was settled in terms of Rule 18 of the Magistrates' Court Rules in respect of the applicant's claim to fifty percent of the respondent's pension fund interest, where such interest did not form part of the issues in dispute between the parties but had in fact earlier been resolved between the parties;

2. This Honourable Court erred in finding that the offer to settle dealt with the applicant's claim in the respondent's pension fund interest as part of the division of the joint estate of the parties where such interest was not in dispute between the parties, the applicant's entitlement having been conceded by the respondent;

3. This Honourable Court erred in finding that the withdrawal of the counter-claim by the applicant resulted in the applicant's abandonment of his common cause claim to fifty percent of the respondent's pension fund interest; and

4. This Honourable Court erred in finding that the withdrawal of the counter-claim meant that the applicant was not entitled to fifty percent of the respondent's pension fund interest.

[10] Respondent's attorney addressed a letter to, amongst others, the Registrar of this Court stating that the respondent "*wishes not to proceed and oppose the appeal*". It would appear that respondent was struggling to secure legal representation.

## **Discussion**

[11] *Section 7 of the Divorce Act*<sup>3</sup> regulates the division of assets and maintenance of the parties upon divorce. In terms of *Subsection 1*, a court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by one party to the other. *Subsection*

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<sup>3</sup> Act 70 of 1979.

7 (a) in turn provides that in determining the patrimonial benefits to which the parties may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to part of his assets. It is clear from paragraph (c) that this applies to marriages in community of property.

[12] *Subsection 8* provides that a court granting a decree of divorce may make an order that any part of the pension interest of a member of the pension fund which is due or assigned to the other party shall be paid by that fund to that other party when pension benefits accrue to that member.

[13] In my understanding, the issue in the court *a quo* was not about whether or not respondent's pension interest formed part of the joint estate. Appellant's complaint was that at the conclusion of the divorce proceedings it was ordered that 30% of his pension interest be paid over to the respondent and that the decree of divorce was silent about his share in the respondent's pension interest. The court *a quo* concluded that the divorce action was settled in the terms proposed by the appellant and accepted by the respondent. It was also noted by the court below that the offer to settle and acceptance thereof was not disclosed by the appellant in his founding affidavit and that he should have done so.

[14] It is trite that an appellate court may only interfere when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision in which the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.<sup>4</sup>

[15] A reading of appellant's offer to settle makes it plain that he tendered to settle all the disputes between the parties in the terms that he proceeded to set out. Further, it is evident from the offer that the respondent will proceed to obtain

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<sup>4</sup> Erasmus Superior Court Practice 2<sup>nd</sup> edition Van Loggerenberg Vol 1 A A2-72B [Service 8, 2019]. Shepstone and Wylie & Others v Geyser N.O. 1998 (3) SA 1036 at 1044 – J 1045 A. National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA at 14 [11].

a decree of divorce upon these terms. The respondent accepted that unconditional offer. It is apparent from paragraph 8 of the offer to settle is that it was preceded by three settlement proposals that were rejected by the respondent. It is apposite to reproduce the terms so proposed by the appellant:

**“NOW WHEREFORE** the Defendant unconditionally agrees to settle the issue in question, with each party to pay his / her own costs, on the following terms:

1. The Defendant shall withdraw his defence and counterclaim upon settlement upon the terms set out herein and the Plaintiff will proceed to obtain a decree of divorce within 1 month of such settlement, or such further period as may be agreed upon.
2. It is recorded that the Defendant is presently paying maintenance in accordance his means and ability.
3. There is one minor child born of the marriage between the parties, namely Ovayo Matundu, a daughter, born on 10 May 2000.
4. It will be in the interest of the minor child born of the marriage between the parties:
  - 4.1 that the care of the minor born of the marriage as envisaged in terms of Section 18(2)(a) of the Children’s Act 28 of 2005, be vested solely in the Plaintiff, subject to the Defendant contact right of contact at all reasonable times;
  - 4.2 that the other parental rights and responsibilities as envisaged in terms of Section 18(2) of the Children’s Act 28 of 2005 be awarded to the parties jointly;
  - 4.3 that both parties are proportionally liable for the maintenance of the minor child.
5. The provision of Section 6(5) of the Children’s Act 28 of 2005 have been applied in that the child has participated during the arrangements.
6. The Defendant agrees to pay to the Plaintiff 30% of his Pension Fund interest held at the Government Employees Pension Fund as at date of divorce.
7. The Defendant agrees that the joint estate be divided on the basis that each party retains the moveable property in his / her possession, save to exclude the immovable property. The Defendant agrees that the immovable property be sold at a mutually agreed market related amount and that the proceeds be shared equally by both parties.

8. The Defendant submits that it is reasonable and fair that each party pay his / her own legal costs in light of the nature of the proceedings and rejection of 3 settlement proposals made by the Defendant to Plaintiff.”

[16] It is noteworthy that the appellant expressly dealt with the issue of his pension interest as well as how their joint estate should be divided. The matter does not end there. Subsequent to the issue of the decree of divorce on the 22 August 2017, there was an application, on notice to the appellant, for the variation of the said order. The order was to be varied to incorporate paragraph 4.1 and 6 of Notice of the offer to settle. Paragraph 6 relates to appellant’s undertaking or agreement to pay 30% of his pension interest to the respondent. No similar application was forthcoming from the appellant, despite that the order made no mention of his entitlement to 50% of respondent’s pension interest. In my view, this is a classic case of the maxim, express mention of one being an express exclusion of the other. It was suggested on behalf of the appellant that the offer to settle was meant to settle disputes between the parties. Appellant’s entitlement to 50% of respondent’s pension interest having been admitted by the latter, was no longer in dispute. It was the court *a quo*’s view that this submission overlooks the fact that the respondent did not seek the forfeiture by appellant of the benefits in community of property, and that therefore her plea to the counter-claim must be seen in that context. In my view, this reasoning cannot be faulted.

[17] I am not persuaded that the court *a quo* erred in finding that the litigation between the parties was settled in terms of *Rule 18 of the Magistrates Court’s Rules*.

**[18] Based on the foregoing, the following order will issue:**

- 1. The appeal is dismissed.**
- 2. The appellant is to pay costs of the appeal, including the costs of the application for leave to appeal.**



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**N G BESHE**  
**JUDGE OF THE HIGH COURT**

**RUGUNANAN J**

**I agree.**

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**S RUGANANAN**  
**JUDGE OF THE HIGH COURT**

**KRUGER AJ**

**I agree.**

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**R KRUGER**  
**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES**

For the Appellant : Adv: T S Miller  
Instructed by : DE WET SHAW AND BAXTER  
C/o WHEELDON RUSHMERE & COLE INC  
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For the Respondent : NO APPEARANCES

Date Heard : 24 May 2021  
Date Reserved : 24 May 2021  
Date Delivered : 14 September 2021