THE SHARING OF PENSION BENEFITS ON DIVORCE: AN INEVITABLE AFFAIR?

(published in (2003) 24 *Obiter* 469-478)

1 Introduction

One of the invariable consequences of divorce is that the patrimonial assets of the marriage have to be divided up between the two parties. At a primary level, the way in which this will occur will be determined by a number of factors: the matrimonial property regime under which the parties had been married; the relevant provisions of the Divorce Act (Act 70 of 1979) that deal with the question of the patrimonial consequences of divorce; as well as any agreement on this often ticklish matter that can be reached by the parties prior to the divorce action. Approximately fourteen years ago, section 7 of the Divorce Act was amended to allow a divorced spouse to share in the pension interests of the other spouse. There is some polemic, though, as to the interpretation of this provision: in particular, it is not clear whether this pension benefit will automatically form part of the assets that are susceptible to division, or whether a prayer to this effect must specifically be sought. After a consideration of the current legal position regarding the sharing of pension benefits generally, this note will examine this specific debate.

2 General principles

Parliament first made provision for the division of a spouse's pension interest in the Divorce Amendment Act (Act 7 of 1989), in the light of suggestions to this end proposed by the South African Law Commission (see the South African Law Commission Report on the *Investigation into the Possibility of Making Provision for a Divorced Woman to Share in the Pension Benefits of Her Former Husband* (1986)). This added sections 7(7) and 7(8) to the Divorce Act. Most important is section 7(7)(a), which states:

> "In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interests of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."

A "pension interest" is defined in section 1 of the Divorce Act to mean that amount that a member of a pension fund would have received if he or she were to resign from the pension fund at the date of divorce. This definition suggests that any pension funds that have already accrued to a beneficiary are not included, and may not be the subject of division (see in this regard the decision in *De Kock v Jacobson and another* 1999 4 SA 346 (W)). One peculiarity is that the definition does not limit a pension interest to that built up during the course of the marriage alone: the gross pension interest up to the date of divorce may be the subject of division (for criticism of this fact, see Fick "Pensioenverrekening tussen gades met egskeiding" 1990 *TRW* 57 93; Sonnekus "Pensioendeling, billikheid én die egskeidingsreg is onversoenbaar" 1994 *TSAR* 48 60). As far as the calculation of the pension interest is concerned, in *Ex parte Randles: in re King v King* ([1998] 2 All SA 412 (D)) it was held that no hard-and-fast rules could be

laid down to determine what a member's pension interest is: this issue has to be determined by examining the rules of the particular pension fund. But once the determination is made, and once it is determined what portion of this pension interest the other spouse is entitled to claim, the amount available to the ex-spouse would therefore be the frozen actuarial value of that portion of the pension interest assigned to him or her by the court, calculated at the date of divorce.

As stated in section 7(7)(a), sections 7(7)(b) and (c) limit the pension benefit that may be deemed to be part of the spouse's assets in two ways. First, any amount that has either been paid over to, or has been earmarked for, a previous spouse by virtue of a previous divorce, must be discounted. Secondly, the deeming provision will not apply to a divorce action in terms of a marriage out of community of property entered into on or after 1 November 1984, in terms of an ante-nuptial contract by which community of profit and loss and the accrual system are excluded. On the face of it, the second limitation may seem inappropriate, not to mention one that is discriminatory, in that it potentially violates the right to equality of treatment contained in section 9(1) of the Constitution, and the right not to be unfairly discriminated against on grounds of marital status contained in section 9(3) of the Constitution. However, this criticism is obviously nugatory in this context, since those who have excluded community of property, community of profit and loss, as well as the accrual system from their marriage do not in fact divide anything between themselves on divorce: the parties merely take their own individual assets out of the marriage. The question of division of pension benefits is therefore irrelevant to those married in terms of this proprietary regime.

Once a court has determined that the pension interest of one spouse is susceptible to division, a court is empowered to make an order that the relevant part of the pension interest be paid to the other spouse, and is also empowered to order that the records of the particular pension fund be endorsed to this effect (s7(8)). However, it is critical to note not only that the value of the benefit is frozen at the amount that would have been due at the date of divorce, but also that such funds have to be paid out to the ex-spouse only once the benefits in fact *accrue* to the member of the fund (s7(8)(a)(i)). The result is that the ex-spouse could potentially claim this benefit only on the retirement of the member spouse, which could conceivably be more than thirty years after the date of divorce, if the parties happen to have been divorced at a young age. The thirty year period is used by way of extreme example: the reality is that in many situations there is likely to be a significant period of delay between the date of divorce and the date upon which the benefit accrues. The effects of inflation will inevitably result in the ultimate financial payout that is made to the ex-spouse amounting to very little, when measured in real economic terms. To add to this, it has been held that the member is not liable to pay interest on the amount between the date of divorce and the date upon which the benefit finally accrues (*Schenk v Schenk* 1993 2 SA 346 (E)).

The tax implications of the decision to divide the pension interests of one of the parties are interesting. In terms of the definition of "gross income" in the Income Tax Act (Act 58 of 1962, section 1(eA)(bb), as substituted by s10(1)(i) of the Revenue Laws Amendment Act 53 of 1999, and amended by s17(1)(b) of the Second Revenue Laws

Amendment Act 60 of 2001), the former member of the pension scheme will be the person responsible for paying the tax on the pension benefit that is ultimately paid out to the ex-spouse once the pension matures. This matter was provided for in the Income Tax Act in the aftermath of tax case no 10404 ((1998) 1 Juta Tax Law Reports 13), in which it was held that any sum to be paid to the ex-spouse in terms of a divorce order was not liable to taxation at all. The entire tax burden now falls upon the member, and there is no liability on the part of the ex-spouse.

3 *Sempapalele* and *Maharaj*

The most recent bone of contention with regard to the division of one spouse's pension benefits is whether the pension benefit will automatically be deemed to be part of the assets susceptible to division, or whether an order to this effect must specifically be sought on the papers. This issue has been of particular concern with regard to those who have been married in community of property, but who are now seeking a divorce, with the ensuing residual consequence that the joint estate must be divided equally between the parties (see, for example, *Gates v Gates* 1940 NPD 361 at 363; *Keyser v Keyser* 1979 4 SA 12 (T) at 15F). The debate has been triggered by two conflicting decisions on the point, delivered by single judges in two different divisions of the high court: Musi J in *Sempapalele v Sempapalele and another* (2001 2 SA 306 (O)), and Magid J in *Maharaj v Maharaj and others* (2002 2 SA 648 (D)). Prior to the amendments outlined and discussed above, the pension interests of the respective spouses married in community of property were not considered to be an asset falling within the joint estate, and were not susceptible to division (see De *Kock v Jacobson supra* 348; Van Zyl "Sharing of pension interests by spouses on divorce" 1985 *De Rebus* 343 344; Van Wyk "Pensioenverwagtinge en diskresionêre bateverdeling by egskeiding" 1988 *THRHR* 228 229; Sonnekus "Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoënsregtelike konteks" 1989 *TSAR* 202 227 and 229-30; Fick 1990 *TRW* 72-74; *Family Law Service* para B18). So, the question that came before these courts was what effect sections 7(7) and 7(8) of the Divorce Act had on this traditional position.

In *Sempapalele*, the applicant and the respondent had been married to each other in community of property, but had been divorced on 15 May 1998 (308I). Their divorce settlement stipulated that their joint estate would be divided equally, but it did not set out the particulars of the joint assets of the marriage, or set down a procedure for how the division of the assets was to occur. During October 1999, the applicant discovered a bank statement in the name of her ex-husband, which reflected a credit of R528 324,94. She then established that a large proportion of this money had been paid to her ex-husband as a result of his resignation from his pension fund at the end of May 1999 (309C-E). The applicant launched an application to have half the amount in the account — R263 162, 47 — paid to her, on the basis that she was entitled to half the value of the respondent's pension benefits as a result of their divorce. Due to the general nature of the divorce order, neither the decree nor the deed of settlement mentioned the fate of the respondent's pension benefits (309F).

The first issue that had to be considered by the court was the legal question whether the applicant was entitled to seek such an order for the payment of a half-share of her ex-husband's pension benefit. In Musi J's words:

> "This raises the legal question of whether the respondent's pension interest was at the time of the dissolution of the marriage part of the joint estate so that it automatically fell within the terms of the blanket order for division or whether the applicant needed to obtain a Court order awarding her a share of such interest in terms of s 7 of the Divorce Act 70 of 1979." (309I-310A)

Musi J pointed out correctly that before the amendments to the Divorce Act, the pension interest of a spouse was not considered to be an asset of the joint estate, and was therefore not susceptible to division. In his lordship's view, the amendments to section 7 had been promulgated to improve the common law position, and to allow one of the parties, in his words, "to gain access" to the pension interest of the other, and so provide for a more equitable distribution of the assets upon divorce (311A-B). However, what concerned Musi J was whether it was possible for an ex-spouse to apply for a determination to this effect after the dissolution of the marriage, rather than at the time of the divorce action. Musi J held that this was not in fact possible (312H). His argument in support of this conclusion can be summarised as follows.

First, his lordship felt that it was highly significant that the question of the pension interest had been included in section 7 of the Divorce Act, which is primarily concerned with the division of assets and maintenance after divorce. In section 7(1), the parties are encouraged to come to an agreement with regard to the division of their assets and the question of maintenance before the decree of divorce is granted, failing which the principles of the relevant matrimonial property regime, as well as the guiding principles of the rest of section 7 would come into play. The fact that the division of assets and the question of maintenance were coupled was important to Musi J: it suggested to him that both the questions of division and maintenance had to be dealt with according to the same general principle: his interpretation of subsection (1) was that these issues had to be considered by the court considering the divorce action. He found support for his conclusion in the fact that it is settled law that a spouse who wishes to be maintained after divorce is expected to seek maintenance from the other party during the course of the divorce proceedings, and is not entitled to seek maintenance for the first time after the marriage has been dissolved (*Schutte v Schutte* 1986 1 SA 872 (A) at 882). If this was the case for maintenance, then, Musi J argued, surely the same should apply to the question of the division of assets, *mutatis mutandis* (312D). Secondly, his conclusion to this effect was strengthened, in his opinion, by the construction of section 7(7)(a), which states that "[i]n the determination of the patrimonial benefits to which the parties *to any divorce action* may be entitled", the pension interest may be deemed to form part of the assets available for division (my emphasis). Musi J held that the term "any divorce action" must mean any "pending" divorce action (312F). Since the applicant was seeking a division of pension benefits after divorce, rather than at the time of the divorce, it was Musi J's view that her application was out of order.

In addition, Musi J found that the applicant's claim ought to fail on a second ground. Even if one were to assume, for the purposes of argument, that the applicant had been entitled to a half-share of her ex-husband's pension benefit, evidence would have had to have been brought to show what the respondent's pension benefit had in fact been at the date of divorce, on the 15th of May 1998. For, as has been pointed out above, the value of the pension interest at the date of divorce is the significant figure. Instead of bringing evidence to this effect, though, the applicant randomly chose to seek a declaratory order for half of the amount of money reflected on her ex-husband's bank statement in October 1999. There was no evidence to suggest how much of this global sum had come from the pension fund, and it was impossible to say on the basis of the papers whether the amount she claimed — the R263 162, 47 — represented the half share of the pension interest at 15 May 1998 (312H-313C). In the words of Musi J: "She has simply not done her spade work" (312I). As a result, the applicant's claim was dismissed.

There can be no quibble with Musi J's finding on the second ground, which would technically have disposed of the application in *Sempapalele* on its own. Therefore, as Magid J perceptively remarked in the *Maharaj* case, Musi J's comments with regard to the propriety of the application to obtain an automatic half-share of the ex-husband's pension interest should really be construed as *obiter dicta* (650H-I. See too the views of Van Schalkwyk "*Sempapalele v Sempapalele*" 2002 *De Jure* 170 171). Nevertheless, Magid J was constrained to deal with Musi J's arguments in this regard, since a similar matter was squarely before him. In *Maharaj*, the applicant and the first respondent had been married in community of property, but had been divorced on 19 December 1996. Since the divorce order made no specific mention of the division of the assets of the estate, the residual rule applied, namely that the joint estate had to be divided equally between the two spouses. A number of years later, the applicant discovered that her ex-husband was about to retire from the Police Services, and that his pension was about to accrue to him. She therefore launched an urgent application to interdict the bank into which the pension money was about to be paid from allowing the first respondent to draw upon the account, in order that a declaratory order could be obtained concerning her rights to a division of the pension interest (649H-650B).

Counsel for the first respondent argued that the application was improper, since the applicant was only entitled to seek an order regarding the sharing of a pension interest at the time of the divorce action. Since that day had passed almost five years before, so it was argued, she was barred from making such a claim. Counsel relied specifically on Musi J's arguments regarding the interpretation of section 7 of the Divorce Act in the *Sempapalele* case to support his submission (650D-E).

Magid J chose to disagree with Musi J's views. The learned judge pointed out that prior to the amendment of the Divorce Act, a pension interest of one spouse did not form part of the joint estate where the parties were married in community of property. The Law Commission and Parliament perceived this to be unfair to the spouse who did not have a pension interest, and as a result, the Divorce Act was amended. Although Magid J does not expressly say so, it is clear that the purpose behind the legislative amendment was the key for him: sections 7(7) and 7(8) were designed specifically to remedy the common law

position, and to provide for an appropriate and equitable division of the pension interest on divorce. In this sense, Parliament chose to state "unequivocally" (651D) that in the computation of the patrimonial benefits to which the respective parties are entitled, the pension interest is *deemed* to be part of the assets susceptible to division, in accordance with the general rules governing the relevant matrimonial property regime under which the parties were married. It was therefore unnecessary for the applicant specifically to have sought a division of the pension benefit of her husband at the time to divorce action was heard, and the failure to do so did not preclude the applicant from a subsequently claiming an order as to her rights in this regard (651A). The answer, in Magid J's eyes, was clear:

> "In my judgment, therefore, when the joint estate of spouses married in community of property is to be divided it is proper to take into account, as an asset of the joint estate, the value of a pension interest held by one of them as at the date of the divorce." (651E)

This finding did not dispose of the issue in *Maharaj*, though. For, in a peculiar twist of affairs, Magid J found it to be evident from the papers that the parties had never in fact got round to dividing up their joint estate, despite the fact that the parties had been divorced almost five years before. In the premises, Magid J decided that the best course of action would be to order that the applicant was entitled to a share of her ex-husband's pension benefit, assessed at the date of divorce. But, since it was apparent that the joint estate had not yet in fact been divided, his lordship ordered the applicant and the first respondent to try to come to some specific agreement with regard to the division of their once-joint estate, or, failing this, to apply for the appointment of a liquidator to facilitate the task for them (652H-653A). The gist of his argument to this end was the following:

> "The order I ... make will take account of the possibility of further litigation between the parties, but I would strongly urge the parties to put an immediate end to this litigation by settling between themselves a proper mode of division of the joint estate. Their patrimony is, in all conscience, too small to justify its being squandered in the payment of further legal fees." (652D)

In the light of the rather strange circumstances of the case, the construction of Magid J's order appears to be a wise one, and hopefully facilitated a resolution of the protracted and ongoing patrimonial relationship of the former spouses. From a strict legal perspective, however, what is of more concern to the law of divorce in general is how the two decisions discussed above conflict with regard to the interpretation and application of section 7(7) of the Divorce Act, particularly where the spouses had been married in community of property, and had made no specific mention of the division of assets in their divorce settlement.

It is my submission that the findings of Magid J in the *Maharaj* case on this legal point are to be preferred over those of Musi J in *Sempapalele*. This is so for a number of reasons. The first requires a careful consideration of Musi J's arguments with regard to the conjoining of orders for the division of assets and maintenance in section 7(1) of the Divorce Act. His lordship points out, quite correctly, that it has been stipulated in

Schutte's case (*supra*) that a spouse seeking maintenance must do so during the divorce proceedings, and cannot seek a maintenance order after the divorce has already been granted. Musi J felt that the same principle should apply, *mutatis mutandis*, to orders for the division of assets. However, it appears, with respect, that Musi J overdid the comparison. In terms of section 7(1) of the Divorce Act, the court may indeed make an order during the divorce proceedings with regard to the division of assets, in the light of a consent paper to this effect submitted by the parties. However, this section only makes provision for a situation where an agreement to this effect has been reached. In the absence of any agreement with regard to division, the ordinary residual rules with regard to the division of the joint estate in community automatically apply: the estate is divided in two. There is no need for a court to make an order to this effect at all. In fact, it can go even further than that. As Magid J pointed out in *Maharaj*: "Indeed, in this province [Natal] orders for division of the joint estate of parties married in community of property are consistently refused when divorce orders are granted for the very reason that they are unnecessary" (649I-J). The limitations imposed by section 7(1) would not apply to this residual situation (for a similar argument, see Van Schalkwyk 2002 *De Rebus* 173).

Secondly, in a situation where an order as to the division of assets is made at the date of divorce, but in bald and unspecific terms (as appears to have been the case in *Sempapalele*, where a blanket division in two of the joint estate was ordered: see 308J) it would seem obvious that the order complies with the provisions of section 7(1). So, then, it appears that section 7(1) has little impact upon the legal problem: the key is how section 7(7) is interpreted in the light of either a residual rule that the joint assets must be shared, or a blanket order has been made to this effect. The answer seems relatively simple: the section deems that a pension interest will be considered to be a patrimonial benefit that is subject to division. In other words, a legislative fiction is created that a pension interest, something that does not normally qualify as a patrimonial asset susceptible to division, will be reckoned to form part of the assets for the purposes of the law of divorce. Section 7(7)(a) does not require a specific court order to this effect at all — the deeming provision simply applies *ex lege*. Had Parliament wished a pension interest to be divisible only where an application to this effect is made, and had Parliament wished the decision to this end to be placed in the hands of the court, then surely it would have done so explicitly? For example, would section 7(7)(a) not have then read: "In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, *the court granting the decree of divorce may, on application, make an order that the pension benefit form part of his assets*." Parliament used very similar wording with regard to the powers a court has to make specific directions to the third party pension fund, in accordance with s7(8): here the court granting the divorce is required to "make an order" to this effect, at its discretion, should it be considered necessary (see on this point Sonnekus 1989 *TSAR* 329ff; 1994 *TSAR* 65-7; Fick 1990 *TRW* 98-9; Van Schalkwyk 2002 *De Jure* 174). But this construction was not followed in section 7(7); instead, a deeming provision was used.

When the overall purpose of the amendments concerning a pension interest are considered — and, lest it be forgotten, the purposive approach to interpretation is now considered to be the most instructive theory of statutory interpretation (see, for example,

Soobramoney v Minister of Health, Kwa-Zulu Natal 1998 1 SA 765 (CC) 772G-H) — it would seem to make sense that in a situation where a marriage in community of property is to be dissolved, and there has been no specific agreement or order as to the fate of a pension benefit, the patrimonial benefits automatically include a pension interest. As Lane ("Pensions and divorce: dealing with pension interests" 1993 *De Rebus* 1090 1091) states:

> "It is generally and correctly assumed that an order granted by the court in regard to patrimonial benefits will automatically apply to the pension interest of a party, save to such extent as it may have been reduced in a previous divorce or accounted for in the agreement for the reallocation of the whole or portion of the pension interest."

As a result, it is submitted that it was within the power of the applicants in both the two cases that have been considered in this note to apply for a declaratory order as to their rights over their ex-spouse's pension interest.

An interesting point that has been raised in commentary is what the legal position would be where a consent paper, describing in some detail the division of specific assets, but making no mention at all of a pension interest, had been made an order of court. Sonnekus (1994 *TSAR* 59-60) seems to suggest (presumably invoking an argument akin to the *expressio unius est exclusio alterius* rule), that the express and detailed mention of the division of specific assets means that other assets are excluded from division. Van Schalkwyk, on the other hand, argues that in the absence of any specific agreement as to the pension interest, the residual law should apply: section 7(7)(a) deems the pension interest to be part of the patrimony available for division, and then the rules of the relevant matrimonial property regime would have to be applied to that asset (2002 *De Jure* 175). Van Schalkwyk's view would appear to be preferable, at least on grounds of principle. At the end of the day, though, this additional uncertainty emphasises that it is advisable for the legal advisors of any party seeking a divorce to try to avoid such difficulties by seeking, insofar as it is possible, to reach an explicit agreement concerning the division of pension benefits, in the light of the modest guidelines currently laid down in the Divorce Act (see too Lane 1993 *De Rebus* 1091-2).

4 Conclusion

The debate that has been discussed above is but one example of the difficulties that have been experienced in practice with the rather vague and general pension provisions of the Divorce Act after they were introduced in 1989. These practical difficulties led to the South African Law Commission re-visiting the whole issue of the division of pension benefits on divorce during the late 1990s: a process that culminated in the publication of the South African Law Commission's *Project 112: Report on the Sharing of Pension Benefits* in June 1999. The Law Commission has recommended that sections 7(7) and 7(8) of the Divorce Act be repealed, and that in their stead, separate legislation ought to be promulgated to deal with this rather complex financial issue. The basic rationale underlying the proposed legislation is that in principle, spouses do have the right to share

in the retirement fund benefits that have been accumulated during the subsistence of the marriage. However, it should be open to the spouses specifically to exclude the sharing of such benefits by way of agreement (*Report* 44). The Law Commission was also of the view that it is inappropriate to continue to treat retirement benefits as a form of matrimonial asset that can be divided according to the residual rules of the relevant matrimonial property regime. Due to the complexity and variety of retirement benefits, it was felt that the only manner in which such benefits can equitably be divided is to separate them from other matrimonial "assets", and to provide a specific mechanism that is tailored for their division (*Report* 49). The proposed draft Bill provides for a formula that will be applied in order to determine how the respective retirement benefits of the parties will be shared. However, the parties will be entitled to agree to a division that is different from the formula, so allowing for flexibility (*Report* 45).

Although the proposed legislation marks a radical departure from the current position, and will impose some complex burdens both upon lawyers and those in the retirement fund industry — a matter conceded by the Law Commission (*Report* 45) — it is submitted that the changes would be welcome, and would bring some much-needed structure to a very significant issue on divorce. The current rules are undoubtedly an improvement on the common law position, where such benefits were not susceptible to division at all; but they are, in their construction and detail, rather undeveloped and vague. The result has been a lack of clarity with regard to how to deal with pension interests on divorce, as evidenced by the conflicting decisions in *Sempapalele* and *Maharaj*. Hopefully Parliament will not delay any longer than it already has in enacting the Law Commission's proposals.

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