IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: **2113/2012**

In the matter between:

B T Applicant

and

L B Respondent

JUDGMENT

CORAM: NULLIAH AJ

HEARD ON: 21 FEBRUARY 2018

DELIVERED ON: 17 SEPTEMBER 2018

I INTRODUCTION AND BACKGROUND

[1] This is an application to amend a court order that granted a final decree of divorce dissolving the bonds of marriage between the parties absent any division of the joint estate.

[2] The parties were married to each other in community of property on the 24 September 2008. In May 2012, the respondent personally instituted divorce proceedings against the applicant and issued summons against her. The applicant was served with the summons on 28 May 2012. Embodied in the summons included prayers for a decree of divorce and further and alternative relief. The summons was absent any claim for forfeiture of benefits in terms of section 9(1) of the Divorce Act 70 of 1979.

[3] A notice of set down was subsequently filed by the respondent on the 28 June 2012 to enrol the matter for hearing on the 5 July 2012 on an unopposed basis.

[4] On the 5 July 2012, Legal Aid South Africa filed a notice of intention to defend on behalf of the applicant. Notwithstanding her instruction to Legal Aid, the applicant subsequently instructed a private attorney and filed another notice of intention to defend on 31 July 2012. Both notices of intention to defend were sent by registered post to the address of the respondent who was not legally represented. No notice of bar was filed by or on behalf of the respondent in terms of Rule 26 of the Uniform Rules of Court.

[5] In addition to filing the notice of intention to defend on the 5 July 2012, Legal Aid also appeared before court on behalf of the applicant who was not in attendance and the matter was subsequently postponed to 2 August 2012. According to the papers filed of record, a letter was issued by the Legal Aid attorney informing the applicant that the matter had been postponed to 2 August 2012. The file is absent any confirmation that the applicant received such notice.

[6] A final decree of divorce was granted by default on the 2 August 2012 merely dissolving the bonds of marriage between the parties and is silent on the division of the joint estate.

[7] The application has as its premise the procedural and substantive unfairness of the divorce order granted by default on the 2 August 2012.

[8] The applicant now seeks an amendment with a view to supplementing the existing order which is silent on the division of the joint estate with an order that includes the division of the joint estate as *per* their marital regime coupled with an award for half of the respondent's pension interest as at the date of divorce.

II APPLICANT'S VERSION

[9] It is the applicant's contention that the final decree of divorce granted by default was both procedurally and substantively unfair and should never have been granted. The applicant contended

that from the onset, she was intent on defending the divorce and accordingly instructed Legal Aid South Africa. Her legal aid attorney, Mrs Oosthuizen, filed a notice of intention to defend on 5 July 2012, prior to the date of divorce being granted and it is alleged that the respondent was aware of the filing of this notice. Notwithstanding Legal Aid being assigned to her initially, due to her lack of trust in her legal aid attorney coupled with the dissatisfactory service she received from her, the applicant appointed a private attorney additionally to defend the action on her behalf. Hence, a second notice of intention to defend was filed on 31 July 2012.

[10] Notwithstanding the filing of two notices of intention to defend, a final decree of divorce was granted in the applicant's absence, dissolving the marriage between the parties on the 2 August 2012. The applicant contended that the divorce order granted by default was procedurally unfair in that the respondent had failed to comply with the Uniform Rules of Court by failing to file a notice of bar after the notice of intention to defend was lodged. It was further unfair in that the applicant was not afforded the opportunity to be heard by court nor the opportunity to lodge a counterclaim against the respondent. According to the applicant, she was not informed of the date of the divorce.

[11] It is also substantively unfair in that the current order is silent on the division of the joint estate and the applicant's share to half of the respondent's pension interest as at the date of divorce. The applicant contended that the resultant effect of the order granted on the 2 August 2012 is that it amounts to her forfeiting her claim to the division of the joint estate and her half share of the respondent's pension's interest. She further contended that the

respondent was a member of the Transport Pension Fund during the subsistence of the marriage until after the final decree of divorce was granted and that his pension interest falls within the joint estate in terms of section 7(7) of the Divorce Act 70 of 1979.

[12] The applicant denied that a meeting was held between herself, the respondent and Mrs Oosthuizen or that any agreement had been reached between them. She argued in her replying affidavit that if the matter had indeed been settled, it would have been reduced to writing and the divorce order would have incorporated the alleged settlement into the court order. The divorce order granted on the 2 August 2012 makes no mention made of such settlement, verbal or otherwise. She contended that these allegations merely constitute an attempt to defeat the division of the estate.

[13] The applicant further denied that she had reneged on their arrangement to secure a property and live together once the marriage was concluded. To the contrary, she contended that the respondent promised to obtain a house for them to live in but he failed to do so. She resided with the respondent at his house for a period of two months but she was unable to endure the constant fighting with his children. She further denied ever being in possession of immoveable property and that the respondent was aware that the property on which she lived fell within the estate of her late grandmother who had died intestate and was survived by three children, one of whom was the applicant's mother and that she herself is one amongst three children. She further denied that the marriage was never consummated and contended that she and the respondent were sexually intimate prior to and after the conclusion of the marriage. She contended that she and the respondent lived together for a period of eight years, approximately four of which were prior to the marriage.

[14] The applicant contended that she is 54 years old, unemployed and a layperson in terms of the law. She was at the mercy of attorneys that were clearly derelict in their obligations towards her and in consequence, an order by default was granted against her. Notwithstanding, she lodged a complaint and was assigned another Legal Aid attorney whom she also found to be unsatisfactory. With the assignment of third Legal Aid Attorney, she now seeks relief in the form of an amendment of the decree of divorce granted on 2 August 2012 with an insertion entitling her to a division of the joint estate and half of the pension interest of the respondent as at the date of divorce. She ascribed the lateness of the present application to the delinquent service she received from her previous legal aid attorneys as well as the private attorney she instructed and accordingly requests condonation. Notwithstanding her concerted efforts and numerous attempts to secure proper legal assistance, she was unsuccessful and thus the lateness of bring this application cannot in all fairness be imputed to her. She further contended that the prejudice suffered by the respondent in the lateness of bringing of this application is outweighed by the prejudice she has endured in consequence of the order granted on 2 August 2012.

[15] Mrs De Wet, on behalf of the applicant argued that it is the practice of this division to require the filing of a notice of withdrawal of defence by the defendant in a settled divorce action prior to the setting down of the said divorce on the unopposed roll. The court did not reflect the filing of such a notice either. She further argued that notwithstanding two notices of intention to defend reflecting in

the court file, the failure to file a notice of bar and the absence of a written deed of settlement or tangible evidence that a verbal agreement had been concluded between the parties, an order was granted in the absence of the applicant.

[16] Ms De Wet further contended that the granting of a divorce order is a matter of public policy[1] and that it is contrary to public policy for one party to obtain an order which has the effect of a forfeiture against the other party who was never barred, who was not afforded an opportunity to file her claims or be heard in the matter. Hence, the present application seeking an amendment of the current court order granting a decree of divorce which effectively amounts to a forfeiture without grounds therefore should be granted in *lieu* whereof justice would fail the applicant.

III RESPONDENT'S VERSION

[17] It is the respondent's contention that the marriage between himself and the applicant was concluded on the premise that the various immoveable properties owned individually by them would be occupied by their children from previous marriages and that he and the applicant would proceed to find a new property on which to stay together. Notwithstanding this arrangement, and directly after the conclusion of the marriage, the applicant expected the respondent to vacate his property and reside with her on her property. This new arrangement was unacceptable to him and upon realising that there was no longer any purpose in remaining married to the applicant, he issued summons for a decree of divorce.

[1] *Ex Parte Inkley and Inkley [1995] 2 All SA 101 (C); Kuhn v Karp 1948(4) SA 825 (T) at 840 – 841, Carter V Carter 1953(1) SA 202 (A) at 205B, Daniels v Daniels: McKay v McKay 1958(1) SA 513 (A) at 532A and Belfort v Belfort 1961(1) SA 257(A) at 259H.*

[18] According to the respondent, the matter was not originally opposed and was therefore enrolled before court on an unopposed basis. He maintained that when the matter was enrolled for the first time, the applicant was absent but her legal aid representative was in attendance and Judge Moloi who was presiding over the matter enquired as to whether the disputes between the parties could not be resolved. A postponement was granted for that purpose. With a view to resolving the matter, the respondent subsequently approached the offices of the applicant's attorney at Legal Aid South Africa. The respondent was also requested to attend the office of her legal representative and they settled that the decree of divorce could be granted on the basis that each party would retain what they currently had in their possession. The matter was again heard by Judge Moloi who was informed that the matter had been settled on that basis and that merely an order for a decree of divorce could be granted. The respondent contended that the court was satisfied that the matter was settled with little costs involved and in those circumstances, the court order was granted.

[19] The respondent that given the fact that at some stage the applicant was legally represented, it is both inconceivable and improbable that the presiding judge in those circumstances would have ignored the applicant's defence and granted an order of divorce. He contended that a settlement agreement had indeed been concluded and in those circumstances, the court was content to grant merely the decree of divorce. He further contended that notwithstanding the settlement agreement not being made an order of court, the agreement at least is enforceable between the parties. In those circumstances and in the absence of a proper case being made for the relief sought, he opposes the application

for amendment and requests that the application be dismissed with costs.

[20] The applicant further moved for an order condoning the late filing of its application in addition to an order varying the final decree of divorce granted on the 2 August 2012 to realise her alleged share of the joint estate. He contended that he was prejudiced by the filing of this application and opposed the application for condonation and amendment. The present application comes approximately five years after the divorce order being granted and he has been unable to obtain the court file or a transcription of the record of proceedings. He further argued that no proper explanation was furnished by the applicant as to lodging this application after the lapse of five years and that the application should be dismissed for that reason alone. The respondent also revealed that he is no longer employed by Transnet. He retired on the 1 January 2016 and there is pension interest in the Transport Pension Fund that can be attached. He denied that he and the applicant ever stayed together after the marriage or consummated it. He further denied the allegations of an extra marital affair. Rather, he argued that the reason for the launching of the is application is based on the applicant's need for money.

[21] Advocate Reinders, on behalf of the respondent contended that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it as it has become *functus officio.* He further contended that while an application for rescission of a judgment can either be brought under Rule 42, Rule 31(2)(b) or the common law, the applicant does not rely on the provisions of Rule 31 to obtain a rescission of the order. He further argued that the applicant is not applying for a

rescission of the order but merely for an amendment and thus insertion of certain orders. He however, argued that the purpose of Rule 42 is to correct expeditiously an 'obviously wrong judgment or order'. While he accepted that what is considered a reasonable time within which to bring such an application depends on the facts of each case, given the unreasonable lapse of five years, the applicant should be precluded from complaining and that the application for condonation be dismissed.

[22] This is in summary the background against which this application must be determined.

The following appears to be common cause between the parties:

1. The parties were married in community of property on the 24 September 2008.
2. The summons issued instituting divorce proceedings is absent any claim by the respondent for forfeiture of benefits.
3. No notice of bar was filed by the respondent.
4. A final decree of divorce was granted by default dissolving the bonds of marriage between the applicant and the respondent on 2 August 2012.
5. The court order is silent on the division of the joint estate.
6. The joint estate as it existed at the date of divorce has never been divided.
7. The court order does not make mention of a deed of settlement, verbal or otherwise nor is there a written or signed deed of settlement that was incorporated in the order.
8. The respondent was a member of the Transport Pension Fund during the subsistence of the marriage until after the final

decree of divorce was granted and that such pension interest falls within the joint estate.

The following appears to be in dispute between the parties:

1. That the parties concluded a verbal settlement agreement to the effect that each party would retain what was currently in their possession in consequence of which the divorce order dated 2 August 2012 was granted.
2. That the applicant has a right to institute a claim for the division of the joint estate for half of the respondent's pension interest in terms of section 7 of the Divorce Act 70 of 1979 pursuant to the decree of divorce being granted.

IV ISSUE

[23] The issue for determination is not whether this court is competent or empowered to vary an existing divorce order but whether it is open to it to vary the existing divorce order by supplementing it with the division of the joint estate long after the dissolution of the marriage when no such order was included by the court granting the decree of divorce.

V APPLICABLE LAW

[24] It is considered prudent to sketch the legal background against which the case falls to be decided. Both the Divorce Act 70 of 1979 and Rule 42 of the Uniform Rules of Court have application.[2] Rule

[2] Rule 42 of the Uniform Rules of Court Superior Court Practice Volume 2
(1) The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:
(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
(b) An order or judgment in which there is ambiguity, or a patent error or omission;
(c) An order or judgment granted as a result of a mistake common to both parties.

42(1)(b) provides that the court may rescind or vary any order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.[3] A patent error or omission has been described as 'an error or omission as a result of which the judgment granted does not reflect the intention of the judicial officer pronouncing it, in other words, the ambiguous language or the patent error or the omission must be attributable to the court itself'. The court is thus not entitled to revisit the whole of its order or judgment and its competence is limited to the interpretation of the order. This subsection effectively confines the powers of this court to the exclusion of the ambiguity, error or omission.

[25] It is well established in our law that 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it - it becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased'.[4] Other than in the circumstances specifically provided for in the Uniform Rules of Court or the common law, *prima facie* the inherent jurisdiction of the High Court patently does not extend to interference with a judgment once it is finalised.

[26] Notwithstanding the general rule, our highest courts have also recognised a number of exceptions to the general rule which are not all inclusive and may be extended to meet the constraints of the particular case.[5] These courts weighed up the principle of finality of judgments against what is just, equitable and sound in law. These exceptions include:

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[3] Rule 42(1)(b) of the Uniform Rules of Court.
[4] *De Wet v Western Bank Ltd 1977 (4) SA 770(t) at 780H-781A.*
[5] *Zondi v MEC, Traditional and Local Government Affairs 2006 (3) SA 1 (CC) at 12 H-13A.*

(a) Supplementing of judgment: the principal judgment or order may be supplemented in respect of accessory or consequential matters, for example costs or interest on the judgment debt, which the court overlooked or inadvertently omitted to grant;

(b) Clarification of judgment: the court may clarify its judgment or order if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter the 'sense and substance' of the judgment or order.

[27] It becomes patent that an order of the High Court could be interfered with under Rule 42 and the common law other than on appeal in that it effectively permits a judicial officer to amend, supplement or clarify[6] its pronounced judgment, provided that the 'sense or substance' of the judgment is not affected or altered thereby. It is also patent that Rule 42 has as its purpose the expeditious correction of 'an obviously wrong judgment or order'. It is accepted that provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it on one or more of the following cases. However, the period within which to bring such an application is not regulated by the Rules of Court.[7] Off course, what constitutes a reasonable time depends on the facts peculiar to the case.

[28] It is putative that 'a marriage concluded in the absence of an ante nuptial contract providing otherwise, creates community of property and profit and loss. The basic concept of a marriage in community of property is "a universal economic partnership of the spouses". All their assets and liabilities are merged in a joint estate in which both spouses, irrespective of the value of their financial

[6] Firestone South Africa (Pty) Ltd v Gentivuro Ag 1977 (4) SA 298 (A) .
[7] Rule 42 of the Uniform Rules of Court.

contributions hold equal shares. All assets that belonged to the spouse before the marriage and those acquired by them during the marriage, form part of the joint estate unless specifically excluded.' [8]

[29] Section 7(7) (a) of the Divorce Act addresses the issue of whether a non-member spouse in a marriage in community of property, is entitled to the pension interest of member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension fund to be part of the joint estate. It states 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. [9]

[30] The purpose of section 7(7)(a) was articulated in *Wiese v Government Employees Pension Fund and Others* {2012} ZACC 5; 2012(6) BCLR 599(CC) para5-9, where the Constitutional Court in dealing with the history and object of the amendment analysed the legislative enactment 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 state for the purpose of determining patrimonial benefits.

[8] See MR v JR [2015] JOL 34218 (GNP). The court was faced with deciding whether to grant forfeiture of pension benefit. The court found that an order for forfeiture could not be granted as there was no misconduct by the party against whom the order was sought. No claim for forfeiture with the allegation of substantial misconduct.

[9] Divorce Act 70 of 1979.

[31] Thus, as regards the entitlement of a non-member spouse under section 7(7)(a) and section 7(8)(a) of the Divorce Act 70 of 1979, the pension interest of the member spouse of parties married in community of property as at date of divorce is by operation of law part of the joint estate for the purpose of determining the parties patrimonial benefits and no order is required in terms of section.[10] Hence, when the joint estate of spouses married in community of property is to be divided, it is thus proper to take into account, as an asset in the joint estate, the value of a pension interest held by one or either of them as at the date of the divorce. This brings the process of giving effect an order for a division of the estate squarely within the ambit of the legislation.

[32] It is therefore follows that where parties who were married to each other in community of property and who in subsequent divorce proceedings did not deal with a pension or provident fund interest which either or both of them may have either by way of settlement or by forfeiture, their proprietary rights do not cease and remain intact and each of them nonetheless remain 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 the divorce by virtue of the provision of section 7(7)(a) of the Divorce Act 70 of 1979[11].

[33] It is also putative that forfeiture of the patrimonial benefits of marriage benefits in community of property may only be ordered where the requirements of section 9(1) of the Divorce Act 70 of

[10] See also *Ndaba v Ndaba (600/2015) [2016} ZASCA 162 (4 November 2016)*

[11] In *Kotze v Kotze and Another* [2013] JOL 30037 (WCC) it was concluded that where the parties married in community of property do not deal with a pension or provident fund interest of either of them during divorce proceedings, they each still remain entitled to a share in the pension or provident fund to which the other spouse belonged. In terms of section 7(7)(a) of the Divorce Act 70 of 1979, such share is to be determined as at the date of divorce. In *Motsetse v Motsetse* [2015] 2 All SA 495 (FB) Jordaan J found that the proprietary rights of parties to a divorce action do not cease upon the termination of the marriage. See at para 15 on page 499 : The legal effect is clear namely that each of the parties is entitle to half of the joint estate. In the determination of benefits, the pension interest of the parties shall be deemed to be part of the assets.

1979 is met. [12] It is accepted that order for forfeiture may not be claimed by way of application. It is also accepted that an order for forfeiture may only be granted after oral evidence has been adduced by the party claiming forfeiture.[13] It is also established law that a party only becomes entitled to a claim for forfeiture once the nature and the extent of the benefit has been identified and proven before a court can decide that the party against whom the claim for forfeiture lies will be unduly benefitted should the order for forfeiture not be granted.[14]

VI ANALYSIS OF LAW AND THE FACT

[34] The divorce action between the parties started approximately six years ago in 2012. On the papers before me, the applicant ascribed the unreasonable delay in the finalisation of the issues to the dilatory conduct of the attorneys in the handling of her matter. Towards that end, the application for condonation of the late filing of the application in both her founding affidavit and the notice of motion. It is also correct that the period within which to bring an application for an amendment is not regulated by the Rules of Court.

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[12] Section 9(1) of the Divorce Act 70 of 1979: When a decree of divorce is granted on the ground of the irretrievable break down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part , if the court, having regard to the duration of the marriage, the circumstances which gave rise to the breakdown thereof and aany substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made , the one party in relation to the other be unduly benefitted.

[13] *Shoko v Mabaso and Others [2015] JOL 33160(GSJ):It is settled law that a forfeiture order can only be granted by a court hearing the divorce action, on the basis of oral evidence place before it during the divorce trial. Even in an unopposed divorce, where a forfeiture order is sought the hearing evidence is fundamental and it would, therefore, be impermissible for a court to grant a forfeiture order without hearing oral evidence. A forfeiture order cannot, therefore be sought by way of motion proceedings.."*

[14] *See unreported case of NWP v NHP (Free State Division) (Unreported case number A201/2013).* In *Wijker v Wijker 1993(4) SA 720 (AD)* it was stated that it is obvious from the wording of section 7(1) that the first step in determining whether nor not there should be forfeiture is to determine whether or not the party against whom the order is sought will in fact be benefitted. Once that it is established the second step is to determine whether or not that party will in relation to the other be unduly benefitted if an order for forfeiture is not made. Then only do the factors such as the duration of the marriage, circumstances leading to the breakdown and substantial misconduct come into play. It was held in *Moodley v Moodley (KZND (unreported case number 7241/2002, 14-7-2008)(Tshabalala JP)* that what the defendant forfeits is not his share of the common property, but only the pecuniary benefit that he would have otherwise derived from the marriage. It was further held that it was of the utmost importance that the claimant, in respect of a claim for the forfeiture must prove some kind of contribution that exceeds the contribution of the other party towards the joint estate.

[35] It is noteworthy that inasmuch as the applicant avers procedural unfairness, she does not oppose the order granting the decree of divorce itself. Her application circuits around the divorce order being absent of the invariable consequences of dissolving a marriage in community of property. I therefore do not consider it expedient to address the aspect of procedural unfairness that culminated in the granting of the divorce order and the launching of the present application given the disputed allegations and the conspicuous absence of tangible evidence to sustain such allegations. It is therefore becomes unnecessary to consider the application for condonation. I am also hesitant to comment or entertain the alleged unconscionable conduct [15] of the respondent in attempting to avoid the division of the estate. Needless to say, there is no convincing evidence before court to buttress such an allegation. In the circumstances, I am content to confine myself to the substantive unfairness of the order granted.

[36] In terms of section 7(1) of the Divorce Act, a deed of settlement has to be in writing. The respondent was unable to produce any written agreement between the parties and the respondent's contention that a verbal settlement agreement had been concluded is disputed. There exists no evidence to that effect either in the form of a witness or a record of proceedings from court. There is no evidence in the form of correspondence with regard to settlement negotiations nor was such alleged settlement agreement made a part of the divorce order.

[37] It is correct that the effect of the order granted on the 2 August 2012 effectively places the applicant in a position as if a forfeiture

[15] *Moraitis Investments(Pty) Ltd and others v Montic Diary (Pty) ltd and Others [2017] 3 ALL SA 485 (SCA):* in contested proceedings, a judgment can be rescinded at the instance of an innocent party if it was induced by fraud on the part of the successful litigant, or fraud to which the successful litigant was a party. Apart from fraud, the only other basis recognised in our case law as empowering a court to set aside its own order is Justus error.

order had been granted against her. The evidence establishes no claim for forfeiture at the time of divorce and it is therefore not necessary to proceed to determine whether the requirements have been met.

[38] It is putative that one of the invariable consequences of a marriage in community of property is that the spouses become co-owners in undivided and indivisible half shares of all the assets acquired during the subsistence of their marriage. And absent a forfeiture of benefits under section 9(1) of the Act or an express agreement between the parties to the contrary, each spouse is entitled to a half share of the joint estate – whatever it entails. It is also putative that the pension interest of a member spouse as at the date of divorce is by operation of law part of the joint estate for the purpose of determining the parties' patrimonial benefits and that no order is required in terms of section 7(7)(a) of the Divorce Act 70 of 1979.

[39] Regarding the patrimonial system governing the parties marriage, where parties are married in community of property the law requires that such joint estate be divided when the marriage is dissolved. The present order is absent any division of the joint estate. It is indeed correct as advanced by the applicant that 'the courts are required to exercise judicial oversight with regards to divorce proceedings and this oversight is necessary to ensure that marriages are dissolved in accordance with sound legal principles and that the law pertaining to the patrimonial consequences of the divorce is properly applied and adhered to.' It is indeed untenable that an order granted in a divorce merely dissolves the bonds of marriage absent any division of the joint estate.

[40] It is incumbent upon this court to exercise its supervisory jurisdiction in relation to the division of the joint estate in the absence of an agreement between the parties. The present divorce order as it stands does not define the right of the applicant and effectively contextualises the ramifications of the granting a decree of divorce absent any division of the joint estate. Division of the joint estate is an automatic and an invariable consequence of a marriage in community of property and automatically ensues where an order of divorce is granted and nothing else is asked for. The supplementing of the existing order with the division of the joint estate merely echoes the invariable consequence of a marriage in community of property, namely division in equal measure inclusive of half of the pension interest of the respondent. The applicant is thus entitled to supplement the decree of divorce so as to include an order for the division of the joint estate.

[41] It is correct that five years has lapsed since the granting of the decree of divorce. It is also correct that the respondent has since retired and received his pension. Given the time lapse, the ramifications of bringing the application at such a late stage must off course be borne by the applicant. This then leaves the question of costs. Notwithstanding that the applicant has achieved substantial success, it is deemed apposite in the circumstances that each party pay their own costs.

VII <u>ORDER</u>

1. In the result, it is ordered that the order granting the decree of divorce on the 2 August 2012 be supplemented to include the following:

   1.1 Division of the joint estate equally between the parties.

1.2 The plaintiff is entitled to 50% of the defendant's pension interest calculated as at the date of divorce.

1.3 Each party is to pay their own costs.

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NULLIAH, AJ

On behalf of the applicant : IL De Wet
Instructed by Bloemfontein Justice Centre

On behalf of the respondent : Advocate Reinders
Instructed by PT Giorgi
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