THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 02/03
Reportable

In the matter between

OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED **First Appellant**

SANLAM LIFE INSURANCE LIMITED **Second Appellant**

and

WANDA SWEMMER **Respondent**

CORAM: ***Harms, Farlam, Brand, Heher JJA et Van Heerden AJA***

HEARD: ***27 FEBRUARY 2004***

DELIVERED: ***18 MARCH 2004***

Summary: Section 7(7) and 7(8) of Divorce Act 70 of 1979 – orders in respect of 'pension interest' – correctness and enforceability of order compelling underwriters and administrators of pension funds to pay proceeds of retirement annuities to non-member spouse

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JUDGMENT

VAN HEERDEN AJA

[1] The main issue in this appeal is the correctness and enforceability of an order made by the court granting a decree of divorce, in terms of which the appellants, two life insurance companies, were ordered to pay the proceeds of certain specified retirement annuities to the respondent (the plaintiff in the divorce proceedings).

[2] The respondent was married in community of property to Dr Ebbie Earl Swemmer. On 20 September 2001 this marriage was dissolved by a divorce order made by the High Court (TPD) on an undefended basis. The order made by the trial court (Stafford DJP) included the following provisions:

'7 Die Verweerder [Dr Swemmer] verbeur die vermoënsregtelike voordele voortspruitend uit die huwelik binne gemeenskap van goed tot die volgende mate:

7.1 Eiseres verkry as haar uitsluitlike eiendom die volgende langtermyn versekeringspolisse:

Maatskappynaam	**Polisnommer**	**Tipe polis**
Sanlam	9971255x6	Uitkeerpolis
Sanlam	PPS016291	Uitkeerpolis
Old Mutual	8661813	Uittredingsannuïteit
Sanlam	9047550x0	Uittredingsannuïteit
Old Mutual	9523162	Uittredingsannuïteit
Sanlam	7241483x2	Uitkeerpolis
Old Mutual	9523162	Uitkeerpolis

8 Die voormelde versekeringsmaatskappye word gelas om die opbrengs van die voormelde versekeringspolisse op die vroegste datum wat die voordele daarvan uitbetaal mag word direk aan die Eiseres uit te betaal.'

[3] Apart from the three specified retirement annuity policies, the other policies referred to either do not exist or appear to have lapsed or have been terminated prior to the divorce. The retirement annuity policies numbered 8661813 and 9523162 are policies in the name of the South African Retirement Annuity Fund ('SARAF'), a duly registered pension fund in terms of the Pension Funds Act 24 of 1956. Old Mutual Life Assurance Company (South Africa) Limited, the first appellant, is the underwriter and administrator of SARAF. Dr Swemmer is the assured in terms of each policy and the member of SARAF in respect of both, while SARAF is the legal owner of the policies and is registered as such in the first appellant's records. The agreed retirement dates, and thus the dates on which the benefits under the policies will in the normal course accrue to the assured, are 1 November 2007 (policy number 8661813) and 1 May 2016 (policy number 9523162), respectively. In terms of the rules of SARAF, Dr Swemmer is, however, entitled to change such retirement dates and the earliest date upon which he could 'call up' the benefits under each policy is upon his reaching the age of 55 years.

[4] Much the same applies to the third retirement annuity policy referred to in para 7 of the divorce order (policy number 9047550x0). Sanlam Life Insurance Limited, the second appellant, is the underwriter and administrator of the Professional Provident Society of South Africa Retirement Annuity Fund ('the PPS Fund'), also a duly registered pension fund in terms of the Pension Funds Act. The PPS Fund is the legal owner of the relevant policy, while Dr Swemmer, as the assured, is a member of the Fund. The agreed maturity date of the policy is 1 October 2007 but, in terms of the rules of the PPS Fund, Dr Swemmer is entitled to anticipate the maturity date, the earliest possible anticipated maturity date being the date of his fifty-fifth birthday.

[5] Dr Swemmer, who has apparently been living at an unknown address in Australia since before the divorce, turned 55 years of age on 2 December 2001. In pursuance of the divorce order, the respondent demanded that the appellants pay the benefits under the retirement annuity policies to her directly, pointing out that her divorced husband had reached 'die minimum ouderdom waarop voordele uitgekeer kan word' and stating that, as sole ownership of the policies had been awarded to her, she had 'beskikkingsbevoegdheid oor die polisse . . . en slegs beperk kan word in die handeling van hierdie polisse vir sover dit kontraktueel of statutêr beperk word'.

[6] For reasons that will be discussed below, both appellants took the view that they were unable to accede to the respondent's demands in this regard. This gave rise to an application brought by the respondent against the appellants in the High Court (Pretoria), in which she sought an order compelling the appellants to pay her the proceeds of the three retirement annuity policies in compliance with the divorce order. Dr Swemmer was not joined as a party to this application.

[7] The appellants opposed the application. At the same time, they brought a counter-application for an order setting aside para 8 of the divorce order or, in the alternative, for an order 'correcting' para 8 by replacing it with the following:

'8.1 Die Suid-Afrikaanse Uittredingsannuïteitsfonds en die PPS Annuïteitsfonds word gelas om die 50% pensioenbelang van Eiseres soos op die datum van egskeiding, waarop sy geregtig is kragtens die verbeuringsbevel hierbo, aan Eiseres te betaal wanneer die pensioenvoordele ingevolge die toespaslike polisse vir Verweerder toeval;

8.2 Die voormelde Suid-Afrikaanse Uittredingsannuïteitsfonds en die PPS Annuïteitsfonds word voorts gelas om 'n aantekening in die rekords van die toepaslike Fondse te maak dat die 50% pensioenbelang voortspruitend uit die toepaslike polisse aan Eiseres betaalbaar is.'

[8] The counter-application was made in terms of rule 42(1). The appellants contended that paras 7 and 8 of the divorce order conflicted with the provisions of s 7(7) and 7(8) of the Divorce Act 70 of 1979, read together with s 37A of the Pension Funds Act, and that they were prohibited by these statutory provisions from giving effect to the order as framed. Moreover, as Dr Swemmer had apparently paid all the amounts owing in respect of the retirement annuity policies concerned, the forfeiture order made by the trial court was incorrect in that it purported to deprive him of more than a 50 percent 'pension interest' (as defined in s 1(1) of the Divorce Act) in such policies.

[9] In regard to the forfeiture order, the court below (Botha J) held that

'. . . die omvang van die verbeuringsbevel net mooi niks met die respondente [the present appellants] te make het nie. Hulle enigste belang in die bevel is vir sover dit hulle mag gelas om 'n uitbetaling te maak wat in stryd met die relevante wetgewing mag wees.'

[10] Botha J held further that the appellants had no *locus standi* to bring the counter-application in terms of rule 42(1) for the setting aside or variation of para 8 of the divorce order. In any event, the failure by the appellants to join Dr Swemmer as a party to the counter-application appeared to him to be an insurmountable obstacle to the relief sought by them.

[11] Turning to the effect of para 8 of the divorce order, Botha J was of the view that the respondent was entitled to immediate payment of the proceeds of the retirement annuity policies, despite the fact that Dr Swemmer, the member of the pension funds concerned, had not anticipated the stipulated retirement (maturity) dates:

'Na my mening val 'n pensioenbelang 'n party toe op die vroegste moontlike tydstip wat dit uitbetaal kan word. Enige ander uitleg sal onbillike en selfs absurde gevolge meebring. Dit spreek vanself dat as 'n polis uitbetaal kan word, dit moes toegeval het. Dit maak net sin in die konteks van wetgewing wat die verdeling en toedeling van bates by 'n egskeiding reël, dat die tydstip wat 'n nie-lid van 'n pensioenfonds geregtig sou wees op die voordele aan hom toegewys, sou wees die vroegste moontlike tydstip . . . . Andersins stem ek met mnr Smith [counsel for the applicant, now the respondent] saam dat die nie-lid gade *pro tanto* in die skoene van die gade wat 'n lid is stap en geregtig is om die uitkeerdatum van dit wat hom of haar toekom te vervroeg of selfs uit te stel, mits die polis dit net toelaat.'

The respondent's application thus succeeded, with costs, and the appellants were ordered to pay her the proceeds of the relevant retirement annuity policies in accordance with the order of the trial court. The counter-application was dismissed with costs. Hence the present appeal with the leave of the court below.

[12] As indicated above, the owners of the retirement annuity policies are SARAF and the PPS Fund, respectively, while the appellants underwrite and administer the said pension funds. In terms of s 5 of the Pension Funds Act and the rules of both SARAF and the PPS Fund, the funds are bodies corporate capable of suing and being sued in their corporate names. In my view, it seems clear that the said pension funds had a direct and substantial interest in the subject matter of the proceedings in the court *a quo* and should have been joined as parties to such proceedings.[1] This point was raised by the appellants in the court below, but was rejected by Botha J. Before us, however, both funds indicated in writing that they waived any right they had to be joined in either the application or the counter-application; that they consented to the steps taken by the appellants in the court below and in the appeal; and that they abide the decision of this court.

[13] Section 37A(1) of the Pension Funds Act provides as follows:

'Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998 [Act No. 99 of 1998], no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being

[1] *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A). See further *Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* 4ed (1997) by Van Winsen, Cilliers & Loots (edited by Dendy) 170-173 and the other authorities there cited.

reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. . . . and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.'

[14] Since the enactment of the Divorce Amendment Act 7 of 1989,[2] s 37A of the Pension Funds Act must, in the context of divorce proceedings, be read together with s 7(7) and 7(8) of the Divorce Act. These subsections, both of which were inserted by s 2 of the 1989 Act, provide that:

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

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph *(a)*, in a previous divorce –

(i) was paid over or awarded to another party; or

[2] Date of commencement 1 August 1989. This legislation resulted from recommendations made by the South African Law Commission (since renamed the South African Law Reform Commission with effect from 17 January 2003) in its *Report on the investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband* Project 41 (October 1986).

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph *(a)* shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

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

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

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

(ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;

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

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

‘ **“pension fund”** means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not’;

‘ “pension interest”, in relation to a party to a divorce action who -

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party’s contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act 1975 (Act No. 55 of 1975), for the purposes of that Act’.

[16] These ‘new’ provisions in the Divorce Act have given rise to difficult problems of interpretation and application, several of which were foreshadowed right from the outset.[3] In argument before us, counsel for the respondent emphasised some of the anomalies and potential inequities to which these provisions may give rise. The ongoing difficulties and

[3] See, for example, U Stander ‘Wysigingswet op Egskeiding 7 van 1989: verdeling van pensioenverwagtinge by egskeiding’ 1989 *De Rebus* 853; J C Sonnekus ‘Pensioenverwagtings en onderhoud na egskeiding in versorgingsregtelike in plaas van vermoënsregtelike konteks’ 1989 *TSAR* 202 and 326; G H Fick ‘Pensioenverrekening tussen gades met egskeiding’ (1990) 15 *TRW* 57.

uncertainties in this regard, particularly concerns expressed by the Life Offices Association and the Institute of Retirement Funds regarding the manner in which the non-member spouse's portion of a pension interest is dealt with, resulted in two further investigations by the South African Law Commission, each culminating in a report and draft Bill.[4] None of the recommendations made by the Commission in this regard has, however, as yet been taken any further by the legislature.

[17] It would appear that, prior to 1 August 1989, the 'interest' which a spouse who was a member of a pension fund had in respect of pension benefits which had not yet accrued was generally not regarded as an asset in his or her estate or, where the marriage was in community of property, as an asset in the joint estate.[5] This meant that, in determining the patrimonial benefits to which the parties to a divorce action were entitled, the 'pension expectations' of the member spouse were not taken into account. The legal position was, however, by no means certain[6] and the rationale for the view that, prior to the occurrence of the so-called 'defreezing contingency' whereby the member spouse's pension benefits accrued to him or her, any interest of the member spouse in respect of such benefits was *not* an asset in his or her estate, has (in my view,

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[4] South African Law Commission *Report on the division of pension benefits on divorce* Project 41 (March 1995) and *Report on sharing of pension benefits* Project 112 (June 1999).

[5] See South African Law Commission 1986 Report (n 2 above) Chapter 3; also Lesbury van Zyl 'Sharing of pension interest by spouses on divorce' 1985 *De Rebus* 343 and A H van Wyk 'Pensioenverwagtinge en diskresionêre bateverdeling by egskeiding' (1988) 51 *THRHR* 228 at 229-230.

[6] See Fick *op cit* (n 3) 64-74 and the other authorities there cited.

correctly) been described as 'complicated and not altogether satisfactory'.[7]

[18] As indicated above, s 7(7)(*a*) of the Divorce Act 'deems' a member spouse's 'pension interest' to be an asset in his or her estate for purposes of the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. 'Pension interest' is narrowly defined and simply establishes a method of ascertaining the value of the 'interest' of the member of the pension or retirement annuity fund concerned as accumulated up to the date of the divorce.[8] In the words of the South African Law Commission:[9]

'A pension interest is not a real asset that is open to division. It is the value that, on the date of divorce, is placed on the interest that a party to those proceedings has in the pension benefits that will accrue to him or her as a member of a pension fund or retirement annuity fund at a certain future date or event in accordance with the rules of the particular fund. The value of the interest is calculated according to a fixed formula and the amount determined in this manner is *deemed* to be an asset of the party concerned. What we are dealing with here is a notional asset that is added to all the other assets of the party concerned in order to determine the extent of the other party's claim to a part of the first-mentioned party's assets.'

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[7] Per Labe J in *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) at 348G-J.
[8] See George L Marx & Kobus Hanekom *The Manual on South African Retirement Funds and Other Employee Benefits* Vol 1 (2003 ed) 552.
[9] South African Law Commission 1995 Report (n 4 above) para 4.1.2.

[19] To my mind, the necessary implication of the 'deeming provision' in s 7(7)(*a*) of the Divorce Act, read together with the relatively narrow definition of 'pension interest' in s 1(1), is that any *other* 'right' or 'interest' which the member spouse may have in respect of pension benefits which have not yet accrued is – at least after 1 August 1989 – *not* to be regarded as an asset in the estate of such member spouse in determining the patrimonial benefits to which the parties to the divorce action may be entitled.[10]

[20] The definition of 'pension interest' also has the effect of circumscribing the powers of the court granting a decree of divorce to make orders in terms of s 7(8)(*a*). Once a part of the pension interest of the member spouse becomes 'due' or 'is assigned' to the non-member spouse in the course of the divorce proceedings, the court may order that such part of the pension interest must be paid by the pension fund concerned to the non-member spouse 'when any pension benefits accrue in respect of' the member spouse. The court may also order that an endorsement be made in the records of the fund concerned to the effect that the part of the pension interest thus allocated to the non-member

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[10] *De Kock v Jacobson & Another* above (n 7) at 348J–349B. It is interesting to note that courts and legislatures in other legal systems have gone much further than South Africa in recognising pension benefits, even if 'unvested' or 'unmatured', as constituting 'property' of the member spouse which is subject to award or division by the court in settlement of property rights between divorcing spouses: see, in this regard, Fick *op cit* (n 3) 74-90; J C Sonnekus 'Pensioendeling, billikheid én die egskeidingsreg is onversoenbaar' 1994 *TSAR* 48 and 211; South African Law Commission 1986 Report (n 3 above) Chapter 4, read with the 1999 Report (n 4 above) Chapter 2. See also Charles C Marvel 'Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses' 94 ALR3d 176, a very detailed and useful annotation on the leading judgment, in this sphere, of the Supreme Court of California (a community property state) in *In re Marriage of Brown* 544 P2d 561.

spouse is 'so payable' to such spouse. That portion of the pension interest allocated to the non-member spouse will thus only be payable by the fund concerned at some future date when the 'pension benefits' in question accrue to the member spouse. This date will be determined by the rules of the pension fund governing the relationship between it and the member spouse.[11] Moreover, there is no provision in the relevant sections of the Act for the pension fund concerned to be ordered to pay to the non-member spouse interest or capital growth on the portion of the pension interest allocated to that spouse from the date of divorce to the date of eventual payment.[12]

[21] Counsel for the respondent submitted that para 7 of the divorce order, in terms of which, in the guise of a partial forfeiture order, Stafford DJP purported to award to the respondent the 'sole ownership' of the three retirement annuities concerned, was competently made in terms of s 9, read with s 7(7)(*a*), of the Act. Para 8 of the divorce order – made, according to counsel, in terms of s 7(8)(*a*) of the Act – merely obliged the appellants to give effect to para 7 by paying to the respondent the full proceeds of the three retirement annuity policies on the earliest date on

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[11] Marx & Hanekom *op cit* (n 8) 553. See also Fred Paul 'Egskeiding – hoe raak dit pensioen?' 2001 *De Rebus* 26 at 28 and Giselle Gould 'Divorce orders and pension benefits: an appeal from the Institute of Retirement Funds' 2000 *De Rebus* 33 at 34.

[12] The parties to the divorce action may provide in a deed of settlement that the member spouse himself or herself will pay to the non-member spouse interest at a specified rate in respect of the portion of the pension interest allocated to the latter, or compensate the latter in some other way for the loss of interest or capital growth (if any) from the date of divorce to the date of payment. While such a provision will be enforceable between the parties themselves, it will not bind the fund concerned. Cf *Schenk v Schenk* 1993 (2) SA 346 (E) at 349D-E where the court (Melunsky J) left open the question whether the court granting an order in terms of s 7(8)(*a*) of the Divorce Act may, in the absence of an agreement between the parties in this regard, order the member spouse to pay interest on the portion of the pension interest awarded to the non-member spouse.

which the benefits under such policies could accrue. As the respondent thus became the owner of the policies in question, she replaced Dr Swemmer as the member of SARAF and the PPS Fund in respect of these policies and thus had the right to 'call up' the policies on the earliest date provided for in the rule of these funds, *viz* the date on which Dr Swemmer attained the age of 55 years. It would seem that this argument was accepted by Botha J in the court below.[13]

[22] In my view, this line of reasoning is fundamentally flawed. Section 9 of the Act provides that:

'(1) 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 break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.'

Since the enactment of the 1989 Act, it is clear that, in determining the nature and ambit of 'the patrimonial benefits of the marriage' referred to in s 9, the 'pension interest' of a member spouse, as defined in s 1(1) of the Act, is deemed to be part of the assets of that spouse (s 7(7)(*a*)). However, as pointed out above,[14] it would seem that any other 'right' or 'interest' which that member spouse may have in respect of pension

[13] See paras [9] – [11] above.
[14] Para [19].

benefits which have not yet accrued under the rules of the relevant fund, is *not* to be regarded as an asset in his or her estate and thus cannot be subject to a forfeiture order in favour of the other spouse.

[23] Provided that the necessary evidentiary basis is laid by the party seeking a forfeiture order,[15] the court may, in the exercise of its discretion under s 9, order that 100 per cent of the pension interest of the member spouse in a specified fund or funds be forfeited in favour of the other spouse. If such an order is made, the court may further, in terms of s 7(8)(*a*), order that 100 per cent of the pension interest concerned must be paid by the relevant fund or funds to the non-member spouse when the pension benefits accrue in respect of the member spouse,[16] and that an endorsement to this effect be made in the records of the fund or funds in question. Notwithstanding such a '100 per cent award', the pension interest, as defined in s 1(1), remains fixed with reference to the date of the divorce, and the future 'accrual date' on which it will become payable to the non-member spouse will still be determined by the rules governing the relationship between the member spouse and the relevant pension fund. The non-member spouse does *not* become the 'owner' of the policy or of the unaccrued pension benefits, does *not* replace the member spouse as a member of the fund, and *cannot* therefore exercise any right of the

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[15] See in this regard *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C) at 601F-I and W*ijker v Wijker* 1993 (4) SA 720 (A) at 727E-728C.

[16] It could be argued that, as far as the three retirement annuity policies are concerned, this was what Stafford DJP intended to achieve by paras 7 and 8 of his order of 20 September 2001. If so, it may well be open to the respondent to apply for an appropriate variation of this order in terms of rule 42(1) upon notice to Dr Swemmer.

member spouse to anticipate (or postpone) the agreed maturity date of the policy. Exactly the same applies where the order made by the court in terms of s 7(8)(*a*) relates to *less* than 100 per cent of the pension interest of the member spouse, irrespective of whether or not such an order is made pursuant to a forfeiture order in terms of s 9.

[24] It follows from the above that, as submitted by counsel for the appellants, both paras 7 and 8 of the divorce order were in conflict with the provisions of s 7(7) and 7(8) of the Act, read together with s 37A of the Pension Funds Act. The pension benefits under the relevant retirement annuity policies having not yet accrued to Dr Swemmer, the pension funds concerned could not at that stage be required to pay *anything* to the respondent, let alone the 'proceeds' of the retirement annuity policies, as stipulated in para 8 of the order. As the appellants were not parties to the proceedings in which this order was made, the order was a nullity as far as they were concerned and they could legitimately disregard it without having it set aside.[17] To my mind, this was a complete answer to the application brought by the respondent against them.

[25] Counsel for the appellants accepted that, if para 8 of the divorce order could not be enforced against the appellants, the counter-application

[17] See, for example, *Sliom v Wallach's Printing & Publishing Co Ltd* 1925 TPD 650 at 656 and *S v Absalom* 1989 (3) SA 154 (A) at 164E-G.

was unnecessary. In any event, to the extent that the counter-application sought to vary the order made in divorce proceedings to which Dr Swemmer was a party, he should have been joined as a party to the counter-application or, at the very least, proper notice thereof should have been given to him in terms of rules 42(2) and 42(3). I agree with the view expressed by Botha J in the court below that the failure to join or notify Dr Swemmer in any way rendered the counter-application defective.

[26] This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of subsecs 7(7) and 7(8) of the Act.[18] If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings.[19] As presently formulated, however, the relevant provisions of the divorce order clearly fall well outside the ambit of the relevant sections of the Divorce Act and the application brought by the respondent to enforce this order should not have succeeded, even if the relevant pension funds (SARAF and the PPS Fund) had been joined as parties to the application.

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[18] See, for example, Gould *op cit* (n 11) and Marx & Hanekom *op cit* (n 8) 563–564.

[19] See *Sempapalele v Sempapalele and Another* 2001 (2) SA 306 (O) at 312A-D and the South African Law Commission 1995 Report (n 4 above) paras 2.3.16 – 2.3.18.

[27] The appellants do not seek any cost order against the respondent, either in respect of this appeal or in respect of the application in the court below.

[28] The following order is therefore made:

1. **The appeal is upheld.**
2. **The order made by the court *a quo* is set aside and replaced with the following order:**

'Both the application and the counter-application are dismissed.'

B J VAN HEERDEN AJA

Concur:
HARMS JA
FARLAM JA
BRAND JA
HEHER JA