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CASE LAW UPDATE

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Cases for discussion

Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others **HC (GS) case no A5067/2020 (31 January 2022)**

Municipal Employees' Pension Fund and Another v Mudau and Another **(1159/2020) [2022} ZASCA 46 (8 April 2022)**

Bwanya v Master of the High Court**, Cape Town and Others [2021] ZACC 51**

Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others HC (GS) case no A5067/2020 (31 January 2022)

This case is about the intersection of matrimonial law principles and pension law.

FACTS

Mrs Collatz was married to Mr Collatz until his death in 2010. However, the parties had already instituted divorce proceedings. Midway through hostilities Mr Collatz's employment terminated and he became entitled to a withdrawal benefit of R10 million. In terms of an election under the fund rules this amount was transferred to an annuity fund. According to Mrs Collatz the parties had agreed he would put the funds in a preservation vehicle pending finalisation of the divorce.

On the death of Mr Collatz the fund wished to allocate the benefit in terms of s37C, but Mrs Collatz referred a complaint to the Adjudicator claiming that since the benefit accrued on his withdrawal it accrued to the joint estate. She had not consented to the transfer (it is possible she did not understand what a preservation fund is, because transfer to such a vehicle would have the same result). She requested the transfer be set aside and the funds paid to her (she was also the executor in Mr Collatz's estate)

The Adjudicator dismissed the complaint, and a section 30P application to the High Court to review the Ajudicator's determination was similarly dismissed

On appeal to the full bench of the High Court Mrs Collatz referred to *De Kock v Jacobson* and other similar authorities which stated there is

> *"there is no reason in principle why the accrued right to the pension should not form part of the community of property existing between the parties prior to divorce."*

The Court distinguished the present matter from those cases on the basis that the statements were made in the context of divorce and not where a marriage is terminated by death. Further, Mrs Collatz's consent was not required for the benefit to be transferred in terms of the fund rules.

Finally, s37C contains a supremacy clause and overrides all other legislation.

The appeal was dismissed

If there is anything useful in this it is perhaps that we need to be careful of the context when we talk about benefits accruing – substantially the same benefit can accrue more than once – as in this case first on withdrawal and then again on death in the fund to which it was transferred. Similarly with benefits that are deferred or transferred to a preservation fund.

Also, different entitlements arise depending on whether a marriage terminates by divorce or death. If by divorce the pension interest and/or accrued benefits must all be taken into account in determining the patrimonial split. However, on death there is no division of pension investments still housed in a pension fund for purposes of a joint estate or accrual claim as they are subject to s37C.

The Court had to decide whether a fund could reduce a member's withdrawal benefit in terms of a rule which was only registered (with retrospective effect) subsequent to the accrual of the benefit

FACTS

Mr Mudau was employed by a local municipality which participated in the fund, the MEPF. He became entitled to a withdrawal benefit when he resigned with effect from 31 May 2013.

On the date his benefit accrued withdrawal benefits were governed by fund rule 37(1)(b)(ii). This rule entitled to him to a benefit of his contributions to the fund plus interest multiplied by 3. ("the Old Rule")

The fund subsequently passed a resolution to amend the rule on 21 June 2013.

Under the amended rule “the New Rule” withdrawing members would only be entitled to their contributions plus interest multiplied by 1.5

The fund wished to reduce the withdrawal benefits on account of concerns of future financial strain. It was further concerned that unless the change was made with immediate effect (ie retrospectively by the time the rule was registered) members would resign in their droves putting the fund under financial pressure.

The rule was submitted to the regulator for approval and was registered on 1 April 2014 with a retrospective effective date of 1 April 2013.

In the meantime Mr Mudau was paid his withdrawal benefit on 18 October 2013 (prior to registration of the New Rule) but calculated in terms of it. He thus obtained half the benefit due under the rule in force at the time he exited the fund.

TIMELINE

31 May 2013	Mr Mudau resigns and his withdrawal benefit **accrues** to him
21 June 2013	The fund passes a resolution, through its board, to amend the withdrawal rule
18 Oct 2013	Mr Mudau is paid his withdrawal benefit calculated at the lower value of the New Rule
1 April 2014	The regulator registers the New Rule with a retrospective effective date of 1 April 2013.

Mr Mudau lodged a complaint with the Adjudicator claiming he was entitled to the larger benefit conferred by the rule in force at the time his benefit accrued. The Adjudicator upheld the complaint.

The fund reviewed the Adjudicator's determination in the High Court. The High Court agreed with the Adjudicator and dismissed the application.

A further appeal to the full bench of the Gauteng High Court was also dismissed.

On appeal to the SCA the Court considered the retroactive application of the New Rule to Mr Mudau's benefit.

The Court focused almost exclusively on section 12 of the Pension Funds Act. It noted that s12(4) permits a fund to determine the date from which an amended rule will operate.

It was evident the rule was intended to operate retroactively and to reduce member's benefits from 1 April 2013 onwards. Rebuttting Mr Mudau's contention that the fund could not apply an unregistered rule to calculate his benefit, the Court stated

> *"the amended rule explicitly states that it operates retroactively and thus reduces pension benefits due to members with effect from 1 April 2013. In my view there can hardly be a clearer indication of an intention to interfere with existing rights with effect from that date. As I have mentioned earlier, there were no statutory impediments to the Registrar approving and registering a rule which sought to impair rights that accrued before its registration."*

The Court held that the New Rule could be applied to all benefits accruing from 1 April 2013, including Mr Mudau's. The appeal was therefore upheld and Mr Mudau had to be satisfied with the lower benefit.

What are we to make of this judgment?

In a brief 6 pages it has seemingly reversed well established principles set down in previous authoritative SCA decisions such as *Mostert* and *Tek Provident Fund* without referring to them or attempting to distinguish the present case from those decisions.

In *Mostert* the Court stated that registration of a rule amendment was "an essential prerequisite" for any change in a fund's rules. On the question of retrospective application of rule amendments it stated:

"It is one thing to give amended rules retrospective effect after registration; ***it is something entirely different to seek to give them binding effect before registration****." (my bold)*

Tek Provident Fund similarly is one of the most relied on authorities regarding the scope of a fund's powers in relation to its rules. It relies on s13 of the Act (the fund rules are binding on the fund and its members) to limit the powers of the fund to those described by the rules at the time the power is exercised.

How does one reconcile the reasoning in this case with earlier SCA jurisprudence? I don't think it's possible. This Court endorsed and approved the application of an unregistered rule to determine a benefit – the very conduct *Mostert* and *Tek* hold to be impermissible. These cases were not overruled, but as a later SCA decision the *Mudau* case will carry considerable weight as a precedent on similar facts.

For a more detailed critique of this case anyone who is interested should read the article by Rosemary Hunter on the web at *https://www.fasken.com/en/knowledge/2022/04/14-sca-judgment-on-retrospective-rule-amendments-upsets-the-retirement-funds-apple-cart*

There are some cogent arguments put up as to why this decision is wrong, and specifically the legal provisions that the Court ought to have taken into account, including the Interpretation of Statutes Act, s37A of the Pension Funds Act, the rule of law embedded in section 1 of the Constitution and so forth.

It will be interesting to see if this judgment goes on appeal to the Constitutional Court, since it is clearly a matter of significant public interest.

Majority decision per Madlanga, J (Khampepe J; Majiedt J; Pillay AJ; Theron J;Tlaletsi AJ concurring)

This case concerns heterosexual permanent life partners and whether or not they should be afforded the same protection as spouses under both the Maintenance of Surviving Spouses Act ("MSSA") and the Intestate Succession Act ("ISA")

BACKGROUND

Bill of Rights (Chapter 2 of the Constitution) has progressively been used over the last two decades to remove unjustified and unfair discrimination against various classes of persons, particularly partners in permanent life partnerships

Line of cases tending towards greater inclusiveness:

- *Satchwell* - Judges' Remuneration and Conditions of Employment Act – judge in committed same sex permanent life partnership claiming her partner should be entitled to same benefits as 'spouse' on her death ie two thirds of Judge's pension etc – upheld

- *Daniels* - Partner to marriage under Islamic Rites held to be entitled to inherit as spouse under ISA

- *Du Toit* - Partner to same sex permanent life partnership permitted to adopt children jointly with partner – Child Care Act only permitted spouses to a traditional marriage to adopt jointly

- *Volks NO v Robinson* (2005) – partner to heterosexual permanent life partnership denied benefits as a spouse under the MSSA, similar facts to present *Bwanya* case. Court holding that since heterosexual partners could choose to marry they did not require special protection as in previous cases where there was some impediment to marriage

Subsequently to *Volks*:

- *Gory* (2006) – partner in same sex permanent life partnership entitled to inherit under ISA, despite the statute only making provision for spouses to traditional marriages to inherit intestate

- Civil Unions Act passed (2006) – now possible for partners to same sex life partnerships to conclude and register Civil Unions. Led to disparity between same sex partners and heterosexual partners – former now had better rights under Gory – even if not in a registered civil union they could still inherit on the basis of previous case law

- *Paixao* (2007) – SCA decision which extended rights of partner in heterosexual permanent life partnership and her daughter to claim loss of support (common law dependant's claim) from the Road Accident Fund when her partner was killed in a vehicle accident

- *Laubscher* (2016) – highlighted different rights between same sex and heterosexual permanent life partners. Partner in this case to a same sex relationship not registered as a civil union was held entitled to inherit under ISA . Minority judgment suggested it was time the Volks decision was revisited.

THE FACTS IN BWANYA

Ms Bwanya claimed to be in a permanent partnership with Mr Ruch until his death. The parties lived together for two years, attended social gatherings and were planning to get married after a trip for Mr Ruch to meet her family. Mr Ruch supported her financially. He died before they could make the trip or get married.

Ms Bwanya lodged claims against his estate for maintenance under the MSSA and for inheritance under ISA, which were rejected by the executor.

Ms Bwanya launched High Court proceedings to enforce her claims. She sought declarators that the provisions of the MSSA and ISA that barred her maintenance and inheritance claims respectively were unconstitutional. The matter settled between the parties but Ms Bwanya still requested the High Court to pronounce on the constitutional issues (by then various public interest groups had joined the litigation). The High Court was bound by the *Volks* decision on the relief sought in respect of the MSSA but upheld the relief sought in respect of the ISA.

Ms Bwanya then applied further to the Constitutional Court to confirm the order declaring the ISA to be unconstitutional and for direct access to appeal the order dismissing the claim under the MSSA.

Although the point was moot (the parties having settled), the CC agreed to entertain the matter in view of the public interest in the outcome.

THE MAJORITY JUDGMENT

This was penned by Madlanga J with 5 others Justices concurring. There is a comprehensive overview of the case law leading up to the decision in *Volks*, and subsequent case law developments. He then looks at the *Volks* case and is critical of the majority judgment, although he finds much support for his views in the minority judgment. He concludes that *Volks* was wrongly decided.

In summary the reasoning is as follows:

As at 2016 3 million people cohabit in relationships other than marriage – should the institution of permanent life partnership not be protected?

The “choice to marry” is often more illusory than real. Evidence presented showed this can be due to a lack of bargaining power or financial strength particularly for women in their relationships or because one or the other partner mistakenly believes they are in a legally protected common law marriage.

Since *Volks* the common law has developed considerably - see the SCA judgment in *Paixao*. This case, he says, opens a new window for not following *Volks* by going the financial dependency route based on agreement. There is no reason that rights based on agreement (partnership) should be less protected than rights based on statute (Matrimonial Property Act, MSSA, ISA)

Madlanga,J then considers the problem of uncertainty arising from establishing whether or not a permanent life partnership existed. He believes these are not insurmountable and points out the courts have already suggested some factors to consider.

These include:

- the respective ages of the partners
- The duration of the partnership
- How the relation is perceived by other parties
- Do they share a common abode?
- Do they have children together?
- Do they share living expenses?
- Does one partner support the other?
- Have they made provision for each other eg in wills?

The challenge to the constitutionality of both statutes was therefore upheld. The order includes a reading in to make provision for partners to heterosexual permanent life partnerships to enjoy the same benefits as spouses to formal marriages in terms of the MSSA and ISA – the order is suspended for 18 months to allow the legislature to make the necessary amendments.

THANK YOU

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