



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 111/11  
[2012] ZACC 5

In the matter between:

MATHILDA LOUISA WIESE Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND First Respondent

MINISTER OF FINANCE Second Respondent

PENSION FUND ADJUDICATOR Third Respondent

CORNELIUS JOHANNES MARX Fourth Respondent

Decided on : 30 March 2012

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JUDGMENT

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NKABINDE J (Mogoeng CJ, Yacoob ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Maya AJ, Skweyiya J, van der Westhuizen J, and Zondo AJ concurring):

*Introduction*

[1] This case highlights the plight previously experienced by people married in community of property and whose spouses were, upon divorce, members of the Government Employees Pension Fund (Government Pension Fund) established under

the Government Employees Pension Law<sup>1</sup> (GEPL). Before this Court is an application for confirmation of a declaration of constitutional invalidity of certain provisions in the GEPL,<sup>2</sup> granted by the Western Cape High Court, Cape Town<sup>3</sup> (High Court), and an appeal<sup>4</sup> against certain parts of the order.<sup>5</sup>

[2] Under the matrimonial laws, non-member spouses could, in certain circumstances, be 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. Prior to the Government Employees Pension Law Amendment Act<sup>6</sup> (GEPL Amendment Act), the non-member's benefit would be frozen on divorce until any pension benefit accrued to that member, unlike that of a counterpart under the Pension Funds Act<sup>7</sup> (PFA). The effect of this was that non-members could not benefit from any interest or capital growth on the portion of the pension interest allocated to the member spouse – thus resulting in the portion devaluing over time.

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<sup>1</sup> Government Employees Pension Law, Proclamation 21 of 1996.

<sup>2</sup> Section 167(5) of the Constitution read with Rule 16(4) of the Constitutional Court Rules. These provisions are set out in full below at n 23.

<sup>3</sup> *Wiese v Government Employees Pension Fund and Others* [2011] 4 All SA 280 (WCC) (Judgment of the High Court).

<sup>4</sup> The appeal was noted in terms of Rule 16(2) of the Constitutional Court Rules. Its provisions are set out in full at n 24 below. The noting of appeal was, due to an administrative error, filed outside the prescribed time. This Court issued an order on 21 November 2011 granting condonation for the late noting of appeal.

<sup>5</sup> Below at n 22.

<sup>6</sup> 19 of 2011.

<sup>7</sup> 24 of 1956.

[3] Invoking the equality provision in the Constitution,<sup>8</sup> the GEPL was originally challenged by the applicant on the ground that it did not afford to a former spouse of a member of the Government Pension Fund the same rights and advantages that are afforded to former spouses of members of funds subject to the PFA. The applicant also sought a constitutional remedy of reading in<sup>9</sup> certain provisions of the PFA<sup>10</sup> into the GEPL together with an order for costs. Only the first and second respondents opposed the application. They, however, conceded that the impugned law would not pass constitutional muster because it infringes the applicant's equality right, but disputed the appropriateness of the relief sought consequent upon a finding of constitutional invalidity.

#### *Legislative history*

[4] There are two parallel regimes of pension funds at play: first, those private funds governed by the PFA and second, government funds which are not governed by the PFA but, rather, by a statute unique to that fund. This latter class of government funds includes, but is in no way limited to, the Government Pension Fund.

[5] During 1989, section 7(7)(a) was added by the Divorce Amendment Act<sup>11</sup> to deal with certain problems. Under the Divorce Act<sup>12</sup> non-member spouses were, in

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<sup>8</sup> Section 9(1) provides:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

<sup>9</sup> *Ex Parte Minister of Safety and Security and Others: In re: S v Walters and Another* [2002] ZACC 6; 2002 (7) BCLR 663 (CC); 2002 (4) SA 613 (CC) at fn 30.

<sup>10</sup> Below at n 17.

<sup>11</sup> 7 of 1989.

<sup>12</sup> 70 of 1979.

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.<sup>13</sup> To cure this defect, the amendment provided that a pension interest is deemed to be an asset in the estate for the purpose of determining patrimonial benefits.

[6] The Divorce Amendment Act was, however, not without difficulties. One was the question of when the payment of a pension interest should occur. Generally, this depended on the rules of a specific fund but usually took place on retirement, dismissal or some other defined "exit event".<sup>14</sup> The problem was that a non-member spouse would be severely prejudiced if the value of his or her benefit was frozen at the date of divorce and the beneficiary would have had to wait for a later exit event.<sup>15</sup>

[7] To cure this defect, various amendments were made to the PFA, in particular, the Pension Funds Amendment Act,<sup>16</sup> which incorporated the "clean-break" principle into section 37D of the PFA.<sup>17</sup> The effect of this amendment is that the non-member

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<sup>13</sup> *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) at para 17. See also South African Law Commission Report *Project 41: Investigation into the possibility of making provision for a divorced woman to share in the pension benefits of her former husband* (October 1986) Chapter 3 (Commission Report); L van Zyl "Sharing of pension interest by spouses on divorce" [July 1985] *De Rebus* 343; and A H van Wyk "Pensioenverwagtinge en diskresionêre bateverdeling by egskeiding" (1988) 51 *THRHR* 228 at 229-30.

<sup>14</sup> The "exit event" includes, but is not limited to, resignation, termination of employment or death of the former spouse. See generally Schedule 1 of the GEPL.

<sup>15</sup> Commission Report above n 13 at Chapter 3.

<sup>16</sup> 11 of 2007.

<sup>17</sup> Section 37D (which is similar to section 24A of the GEPL, as amended) provides, in the relevant part:

"(1) A registered fund may—

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- (a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962), and any amount due to the fund in respect of—
    - (i) a loan granted to a member in terms of section 19(5); or
    - (ii) any amount for which the fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to the member in terms of section 19(5), from-
      - (aa) the amount of the benefit to which the member or a beneficiary becomes entitled in terms of the rules of the fund;
      - (bb) in the case of a transfer of the member to another fund, the amount of the benefit which the fund is so entitled to transfer, if the board of the transferor fund is satisfied that it is not otherwise reasonably possible to negotiate the repayment or to transfer the loan or the guarantee; or
      - (cc) in the case of default on the repayment of any such loan by the member concerned in circumstances where his or her membership of the fund is not terminated, the amount of the benefit which the member would have received on termination of membership on the date of default, if such a deduction is only effected as a last resort after the board of the fund is satisfied that no other arrangement for the required repayment can be made;
  - ...
  - (d) deduct from a member's benefit or minimum individual reserve, as the case may be—
    - (i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979);
    - (iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No. 99 of 1998); and
    - (ii) employees' tax required to be deducted or withheld in terms of the Fourth Schedule to the Income Tax Act, 1962 (Act No. 58 of 1962), as a result of the deduction referred to in subparagraph (i) or (iA);
  - ...
  - (3)(a) Any amount that may be deducted in terms of subsection (1)(d) may only be deducted after the amount of pension interest available has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where such a loan or guarantee was granted prior to the granting of the court orders, irrespective of the fact that that amount is due and payable or not: Provided that the aggregate of all amounts deducted in terms of this subsection may not exceed the member's pension interest available at any given time.
  - (b) In the event that more than one of the court orders referred to in subsection (1)(d) provides for the deduction of amounts from a member's benefit or minimum individual reserve, as the case may be, at the same time, the court orders must be dealt with in accordance with the following hierarchy—
    - (i) any maintenance order referred to in subsection (1)(d)(iA);
    - (ii) any decrees of divorce or for the dissolution of a customary marriage.

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- (4)(a) For purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted, and, on the written submission of the court order by the non-member spouse—
- (i) must be deducted by—
    - (aa) the pension fund or pension funds named in or identifiable from the decree;
    - (bb) the pension fund or pension funds to which the pension fund referred to in item (aa) transferred the pension interest referred to in the decree;
  - (ii) must be deducted on the date on which an election is made or, if no election is made within the period referred to in paragraph (b)(i), the date on which that period expires; and
  - (iii) must reduce the member's accrued benefits or minimum individual reserve at the date of the decree.
- (b)
- (i) The pension fund must, within 45 days of the submission of the court order by the non-member spouse, request the non-member spouse to elect if the amount to be deducted must be paid directly to him or her, or if it must be transferred to a pension fund on his or her behalf.
  - (ii) The non-member spouse must within 120 days of being requested to make an election—
    - (aa) inform the pension fund of how the amount referred to in subparagraph (i) must be dealt with; and
    - (bb) if he or she elects that the amount must be paid to him or her directly, provide the pension fund with the details of how that payment must be effected; or
    - (cc) if he or she elects that the amount must be transferred to a pension fund on his or her behalf, provide the pension fund with the details of that pension fund.
  - (iii) The pension fund must pay or transfer the amount within 60 days of being informed of how the amount must be dealt with in accordance with the non-member spouse's election.
  - (iv) In the event that the non-member spouse fails to make an election or identify the pension fund to which the amount should be transferred within the period referred to in subparagraph (ii), the pension fund must pay the amount directly to the non-member spouse within 30 days of the expiry of that period.
  - (v) Despite subparagraph (iv), in the event that the pension fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, the pension fund must retain the amount and any fund return referred to in paragraph (c)(ii) in the pension fund until such time as details of how that payment must be effected is made available to the pension fund by the member, the non-member spouse or any other person.
- (c) A non-member spouse—
- (i) is not a member or beneficiary in relation to the pension fund; and
  - (ii) is entitled to the accrual of fund return on the amount referred to in paragraph (a) at fund return from the expiry of the period referred to in

spouse no longer has to wait for an exit event to occur. This means that a pension benefit awarded to a non-member spouse in terms of the Divorce Act is deemed to have accrued on the date of the divorce. This demonstrates the interplay between the Divorce Act and the PFA.

[8] The oversight, however, is plainly that these amendments only apply to the PFA and, by extension, to funds that are governed by the PFA. As mentioned above, this is only one leg of the parallel regime. The Government Pension Fund could not benefit from the clean-break principle, as it is governed by its own statute, the GEPL.

[9] In its amended form, section 3 of the GEPL Amendment Act introduces a clean-break principle by incorporating section 24A after section 24 of the GEPL. Section 24A is, in effect, similar to section 37D of the PFA.<sup>18</sup> Section 24A authorises

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paragraph (b)(ii) until payment or transfer thereof, but not to any other interest or growth.

- (d) Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, section 7(8)(a) of the Divorce Act, 1979, deemed to have accrued to the member on 13 September 2007 and must be paid or transferred in accordance with paragraphs (a) and (b).
- (5) Despite paragraph (b) of the definition of “pension interest” in section 1(1) of the Divorce Act, 1979, the total amount of annual simple interest payable in terms of the definition may not exceed the fund return on the pension interest assigned to the non-member spouse in terms of a decree granted in terms of section 7(8)(a) of the Divorce Act, 1979.
- (6) Despite paragraph (b) of the definition of “pension interest” in section 1(1) of the Divorce Act, 1979, the portion of the pension interest of a member of a pension preservation fund or provident preservation fund (as defined in the Income Tax Act, 1962), that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated on the date on which the decree was granted.”

<sup>18</sup> Id.

the Government Pension Fund to make payment of a pension interest upon divorce or dissolution of a customary marriage. It provides, in the relevant part:

“24A(1) The Board shall direct the Fund to reduce a member’s pension interest by any amount assigned from the member’s pension interest to the member’s former spouse in terms of a decree of divorce granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), or a decree for the dissolution of a customary marriage.

(2)(a) Subject to paragraph (j), for purposes of section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of a member’s pension interest assigned to the member’s former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or the decree for the dissolution of a customary marriage is granted.

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(j) Any portion of a member’s pension interest assigned to a former spouse in terms of a decree of divorce or a decree for the dissolution of a customary marriage granted prior to the enactment of this subsection shall, for purposes of any law other than the Income Tax Act, 1962 (Act No. 58 of 1962), including, but not limited to, section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979), be deemed to have accrued to the member on the date of enactment of this subsection, and must be paid or transferred in accordance with paragraphs (a) to (i).”

### *Parties*

[10] The applicant, Ms Wiese, was married in community of property to the fourth respondent, a member of the Government Pension Fund. The first and fourth respondents are cited because of their interest in the relief sought in the High Court.<sup>19</sup>

The second respondent, the Minister of Finance (Minister), is cited as the member of

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<sup>19</sup> This is so because if the relief sought by the applicant were to be granted, she would have been entitled to payment of 50% of the remaining value of the fourth respondent’s pension interest as at the date of their divorce.



the national executive responsible for the administration of the Government Pension Fund. Both the Government Pension Fund and the Minister are, where appropriate, collectively referred to as the respondents. The third respondent is the Pension Fund Adjudicator.

*Factual background*

[11] The marriage bond between the applicant and the fourth respondent was terminated by a decree of divorce granted during 2008. They entered into a settlement agreement which formed part of the decree of divorce. In terms of this agreement, the applicant was awarded a 25% share of the fourth respondent's pension interest existing in the Government Pension Fund. She could not, however, realise her share of the pension interest because relevant provisions of the GEPL, unlike the PFA, allowed for the realisation of the interest only upon the occurrence of an exit event.<sup>20</sup> None of these events had occurred in relation to the applicant.

[12] Because of financial difficulties, the applicant, albeit unsuccessfully, sought to realise her share of the pension interest. She also unsuccessfully sought help from various institutions, government ministers, and officials.

[13] The applicant then launched proceedings in the High Court for an order declaring the GEPL inconsistent with section 9(1) of the Constitution<sup>21</sup> and invalid to the extent that it does not afford to a former spouse of a member of the Government

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<sup>20</sup> Above n 14.

<sup>21</sup> Above n 8.

Pension Fund (i.e. a person in the position of the applicant), the same rights and advantages as are afforded to former spouses of members of funds subject to the PFA. She further sought an order reading in those provisions of the PFA, which allow for the immediate realisation of pension benefits awarded on divorce to the non-member spouses of members of private pension funds.

[14] The High Court granted a declaratory order on the basis that the differentiation between a non-member spouse of a PFA fund member and a non-member spouse of the Government Pension Fund member arose out of the legislature's failure to apply the clean-break principle upon divorce to a particular class of people. The Court rejected the applicant's argument that reading-in was the appropriate remedy. It suspended the declaration of invalidity to allow Parliament to remedy the defect.<sup>22</sup>

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<sup>22</sup> The relevant parts of the order of the High Court read:

- “1. It is declared that the Government Employees Pension Law, Proclamation 21 of 1996, is inconsistent with section 9(1) of the Constitution. . . insofar as it fails to afford to former spouses of members of the [Government Pension Fund] the same rights and advantages as are afforded to former spouses of members of funds subject to the [PFA], more particularly those contained in section 37D(1)(d), (3) (4) and (5), and is invalid to the extent of that inconsistency.
2. This declaration of invalidity is suspended for 12 months to allow Parliament to correct the defect.
3. Should Parliament not correct the defect within this period, the following provisions will be read in to the Government Employees Pension Law with effect from the date of this order:
 

‘24A The Fund may make certain deductions

  - 1) The Fund may deduct from the members pension interest, as defined in the Divorce Act, 70 of 1979,
    - a) any amount assigned from such interest to a former spouse in terms of a decree granted under s 7(8)(a) of the Divorce Act, 70 of 1979, and
    - b) employees' tax required to be deducted or withheld in terms of the provisions of the Income Tax Act, 1962 (Act 58 of 1962) as a result of the deductions referred to in sub-paragraph (a).
  - 2) In the event of any loans or guarantees having been made or granted as contemplated in the Rules of the Fund, s 37D(3)(a) of the Pension Funds Act, 24 of 1956, shall apply mutatis mutandis.

[15] The order of constitutional invalidity was referred to this Court for confirmation<sup>23</sup> and the applicant noted an appeal<sup>24</sup> against part of the remedy. The confirmation proceedings and appeal were set down for hearing on 28 February 2012, in terms of the directions issued by the Chief Justice on 21 November 2011.

[16] On 14 December 2011, while the confirmatory and appeal proceedings were pending, Parliament passed the GEPL Amendment Act to cure the defects in the GEPL. As a result of this legislative intervention, a question arose whether any live constitutional issue requiring determination by this Court was extant. In this regard, further directions dated 12 January 2012 were issued, requiring the parties to lodge written submissions on mootness.

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- 3) The provisions of s 37D(3)(d) and 37D(4) - (5) of the Pension Funds Act, 24 of 1956, shall apply mutatis mutandis in respect of any deductions in payment to a member's former spouse in terms of ss 1; provided that any portion of pension interest assigned in the decree of divorce or dissolution of customary marriage granted prior to 1 July 2011 is deemed to have accrued on 1 July 2011."

<sup>23</sup> In terms of section 167(5) of the Constitution read with Rule 16(4) of the Constitutional Court Rules.

Section 167(5) provides:

"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

Rule 16(4) provides:

"(4) A person or organ of state entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

<sup>24</sup> Rule 16(2) of the Constitutional Court Rules provides:

"A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice."

*Submissions in this Court*

[17] The applicant submits that the GEPL Amendment Act disposes of the need for the substantive relief she seeks. She argues, however, that this Court might still determine the merits in another matter on a similar issue which was set down for hearing together with this matter.<sup>25</sup>

[18] The applicant contends that she would have been successful in her appeal, or at the very least, in obtaining an order of confirmation of the declaration of invalidity. She argues that the appropriate order in the circumstances would be to strike the matter from the roll and require the respondents to pay her costs to the date of the order. Alternatively, she contends that the Minister alone should pay her costs to the date of the order. She asks this Court to uphold the High Court costs order since there is no appeal against it.

[19] The respondents submit that the relief sought by the applicant is catered for by the clean-break principle. They contend that any determination of the substantive issues raised would have no practical effect. In relation to the application for leave to appeal, the Minister sets out detailed arguments on the policy considerations that

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<sup>25</sup> *Phumla Ruth Patricia Ngewu and Another v Post Office Retirement Fund and Others* CCT117/11. This matter has since been removed from the roll and set down for hearing in February 2013. The applicants, Ms Ngewu and the Women's Legal Centre Trust, lodged a direct access application in terms of Rule 18 of the Rules of this Court. The order sought included: (a) a declaration of constitutional invalidity of the Rules of the Post Office Retirement Fund on the basis that they are inconsistent with section 9 of the Constitution and thus invalid, to the extent that they fail to incorporate a rule equivalent to that contained in section 37D(4) of the PFA; (b) a declaration of constitutional invalidity of the PFA and the Divorce Act 70 of 1979 on the basis that the statutes are inconsistent with section 9 of the Constitution and thus invalid to the extent that they fail to apply a similar provision as that contained in section 37D(4) of the PFA to unregistered government pension funds; (c) a constitutional remedy of reading in the wording of section 37D(4) of the PFA into the impugned Rules of the Post Office Retirement Fund; (d) an order authorising the Post Office Retirement Fund to deduct 50% of the fifth respondent's pension interest calculated as at 13 September 2007 plus interest from that date; and (e) costs.

would be necessary for this Court to determine the merits. The Minister submits that the applicant was well aware of the steps that were taken by the legislature to remedy the defect in the GEPL but nonetheless lodged an appeal. For these reasons, he submits that the applicant must bear her own costs for the appeal.

[20] In light of the submissions regarding mootness, the Chief Justice issued further directions, dated 25 January 2012, requiring the parties to lodge written submissions on costs. Apart from these submissions, the balance of the relief regarding costs on appeal remains unresolved. Notwithstanding this, two weeks before the hearing date, the respondents urged this Court to decide the issue of costs on the papers.<sup>26</sup>

### *Mootness*

[21] Both the applicant and respondents suggest that the GEPL Amendment Act caters for the applicant and other former spouses of Government Pension Fund members, and that passing judgment upon the substantive issues in the confirmation proceedings and the appeal would have no practical effect. The question then arose

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<sup>26</sup> In the light of the letters dated 15 February 2012 and 17 February 2012 from the second and first respondents, respectively, the Chief Justice issued directions on 22 February 2012, removing the matter from the roll, to be dealt with in terms of Rule 13(2) of the Constitutional Court Rules, i.e. without oral argument.

The 15 February 2012 letter reads, in relevant part:

“Please be advised that we seek directions that the matter be dealt with in terms of Rule 13(2) of the Constitutional Court Rules, that is, without the hearing of oral argument.”

The 17 February 2012 letter reads, in relevant part:

“The only issue that remains to be decided is that of costs, which it is submitted can be dealt with by way of written submissions, if you would be inclined to direct the parties accordingly.”

The applicant did not respond to these directions. In her written submissions, in response to earlier directions dated 12 January 2012, the applicant contends that the appropriate order would be to strike the matter from the roll and order the respondents to pay her costs.

whether this Court should nevertheless consider whether the issue has been rendered moot.

[22] It is well-settled that a case is moot and not justiciable if it no longer presents a live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.<sup>27</sup> However, as this Court has repeatedly held, the absence of a live controversy does not constitute an absolute bar to a matter's justifiability because this Court has a discretion whether to consider it.<sup>28</sup> The test is one of the interests of justice.<sup>29</sup> The discretion hinges upon whether any order a court makes will have a practical effect either on the parties or on others, even if the matter may be moot as between the parties.<sup>30</sup>

[23] Having considered the provisions of the GEPL, before and after its amendment and in relation to the relief sought by the applicant in the High Court,<sup>31</sup> there can be no doubt that the substantive cause of the complaint by the applicant has been removed by that legislative intervention. The resolution of the validity of the GEPL and the

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<sup>27</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (1) BCLR 39 (CC); 2000 (2) SA 1 (CC) (*National Coalition*) at para 21 and fn18.

<sup>28</sup> *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (4) BCLR 442 (CC); 2008 (2) SA 472 (CC) (*Van Wyk*) at para 29; *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (3) BCLR 231 (CC); 2005 (4) SA 319 (CC) at para 22; and *National Coalition* above n 27.

<sup>29</sup> *Van Wyk* above n 28.

<sup>30</sup> *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (9) BCLR 883 (CC); 2001 (3) SA 925 (CC) at para 9 and *President Ordinary Court Martial, and Others v Freedom of Expression Institute and Others* [1999] ZACC 10; 1999 (11) BCLR 1219 (CC); 1999 (4) SA 682 (CC) at para 16.

<sup>31</sup> In that Court the applicant, among other things, sought an order “[d]eclaring that the Government Employees Pension Law, Proclamation 21 of 1996 is inconsistent with section 9(1) of the Constitution . . . and invalid.”

appeal after that intervention will therefore have no practical effect on the parties. The substantive issues between the parties have thus become moot.

[24] Accordingly, it is not in the interests of justice to pronounce on the validity of the GEPL or the appropriate constitutional remedy on appeal. What remains for determination is the issue of costs on appeal.

### *Costs*

[25] This Court’s jurisdiction is limited by section 167(3)(b) of the Constitution to deciding “constitutional matters, and issues connected with decisions on constitutional matters.”<sup>32</sup> There can be no doubt that a question relating to costs in this case is connected with decisions on constitutional matters.<sup>33</sup> The primary consideration of an award of costs in constitutional litigation is whether the costs order may hinder or promote the advancement of constitutional justice.<sup>34</sup>

[26] The applicant is a private litigant who has enjoyed a measure of success in the High Court. She had to approach the High Court to assert her right after unsuccessfully entreating the government to intervene. She successfully vindicated

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<sup>32</sup> Section 167(3) provides, in the relevant part:

“The Constitutional Court—

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(b) may decide only constitutional matters, and issues connected with decisions on constitutional matters”.

<sup>33</sup> *Stainbank v SA Apartheid Museum at Freedom Park* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at para 27.

<sup>34</sup> *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (10) BCLR 1014 (CC); 2009 (6) SA 232 (CC) at para 16. See also *Chonco and Others v President of the Republic of South Africa* [2010] ZACC 7; 2010 (6) BCLR 511 (CC) at para 6.

her constitutional right to equality and equal protection of the law, when she challenged the validity of the GEPL. This law, as mentioned earlier, deprived her of the capital growth on the portion of the pension interest allocated to the non-member spouse on divorce.

[27] The contention that the applicant was well-aware of the steps that were taken by the legislature to remedy the defect in the GEPL before lodging the constitutional challenge, is neither here nor there. That is so because that challenge was launched on 11 September 2009, long before the National Treasury's February 2011 policy document,<sup>35</sup> which indicated that the recommendations of the South African Law Reform Commission (SALRC) on the clean-break principle were being considered. In any event, these alleged steps did not guarantee the applicant the relief sought in the High Court.

[28] The Minister had a duty to ensure that any provision of the impugned legislation that was inconsistent with the Constitution was suitably amended without delay.<sup>36</sup> Had he done so, particularly after the recommendation of the SALRC, the applicant might not have approached the High Court to vindicate her right. She was also entitled to appeal against that part of the order regarding the constitutional remedy to enforce her right and to obtain what she considered to be an effective remedy.

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<sup>35</sup> Judgment of the High Court at para 35.

<sup>36</sup> *Malachi v Cape Dance Academy International (Pty) Ltd and Others* [2010] ZACC 24; 2011 (3) BCLR 276 (CC) at para 8.



[29] In these circumstances, the applicant is entitled to her costs since the Minister failed to provide her with an undertaking that a new law would be passed, that the relief she required would become available soon, and that there was, therefore, no need for her to bring court proceedings.

[30] For these reasons, I am satisfied that the Minister must also pay the costs which the applicant has incurred in appealing the High Court's order on remedy, which shall, where appropriate, include the costs of two counsel.

*Order*

[31] In the event, the following order is made:

The Minister of Finance is ordered to pay the applicant's costs in this Court, including the costs of two counsel.

For the Applicant:

Advocate HJ de Waal and  
Advocate D Kusevitsky instructed  
by Bornman & Hayward Inc.

For the First and Second  
Respondents:

Advocate PJ Pretorius SC and  
Advocate S Yacoob instructed by  
Bowman Gilfillan Inc.