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IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, JOHANNESBURG

Case number:
33610/2014

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

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DATE

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In the matter between:

D M

APPLICANT

AND

MS

RESPONDENT

JUDGMENT

WENTZEL, AJ:

1. The applicant has brought an application to declare the respondent in contempt of the court order granted by Tsoka J on 30 January 2017. The order was made

pursuant to an agreement of settlement between the parties at the date of their divorce.

2. Prior hereto, the parties had concluded an agreement of settlement in principal, but at the day set down for their divorce (27 November 2015), the respondent refused to sign the agreement of settlement have the agreement made an order of court.
3. As a result, the respondent appointed new attorneys, entered an appearance ot defend, and filed a plea.
4. This action was finally settled in terms of the agreement of settlement now relied on these proceedings.
5. In terms of the latter settlement, it was provided that, as a consequence of their marriage in community of property:
 - 5.1. the applicant would buy out the defendant's 50% share of the matrimonial home at the aggregate value of the "*two independently appointed valuers to be appointed by each party respectively*", within 30 days of the parties agreement on such valuation;and
 - 5.2. the respondent undertook to vacate the matrimonial home within three weeks of the receipt of his share of the applicant's pension interest.
6. The difficulty that has arisen is the identity of the pension interest which it was agreed should be shared between the parties.
7. At the time that the applicant instituted divorce proceedings against the respondent on 11 September 2014, she was employed by Shanduka (Pty) Ltd ("Shanduka"). In her particualrs of claim, the applicant sought that the

respondent forfeit of the benefits of their joint estate, inclusive of this pension interest and the respondent's half share of their matrimonial home.

8. However, subsequent to instituting the said action, and after the first settlement agreement concluded between the parties, the applicant withdrew her pension interest at Shanduka prior to it being transferred to the Pembani Group Ltd's pension interest ("*Pembani*") pursuant to a merger between Shanduka and Pembani.
9. However, when the respondent entered into the second settlement agreement, he avers that it was not disclosed that the applicant had withdrawn her pension interest in the amount of R495 599.2, and that the respondent was told subsequent to the divorce that all that had accrued to her since the takeover by the Pembani Group of Shanduka was R 61 669.76 after 12 years of employment, entitling the respondent to a mere R 30 834.88. This was subsequently increased to R 83 550.02, with the respondent's half share being R41 775.01.
10. It is clear from the provisions of section 7(7) (a) of the Divorce Act, 1979, that where parties are married in community of property, their joint estate includes the pension interests of the parties.
11. When it emerged that the applicant had claimed her pension interest from Shanduka and had not accounted to the respondent herefor, the applicant claimed that she had utilized the proceeds towards the maintenance of the children and support of the joint household.
12. However her bank statements revealed that between 8 March 2016 and 8 February 2017 she had virtually dissipated the entire pension interest on luxuries for herself on expensive shoes and clothes. She had also paid for the funeral expenses of a person who she did not reveal why were to be regarded as an expense of the joint estate. The expenses pertaining to the children's education was minimal in the scheme of the other amount expended.

13. With this background in mind, I will now deal with the basis for the current contempt application.
14. It would seem that subsequent to the divorce between the parties on 30 January 2017 incorporating the agreement of settlement, each party interpreted the agreement to mean that they could each obtain two valuations of the matrimonial home and that the aggregate hereof would constitute their valuation of the property, which would then ultimately be aggregated to determine the value of the property. I believe this to have been a misreading of the agreement of settlement which makes it clear that each of the parties could obtain a valuation and the aggregate of that single valuation would serve as the agreed valuation of the property.
15. Be that as it may, the respondent ultimately offered to pay the respondent his half share of the property in the amount of R 400 000 exclusive of an amount of R 36 380 commission payable to the estate agent commissioned by the applicant. Why it is averred this amount is payable by the estate briefed by the applicant and not the respondent and why this amount would be payable at all for a valuation is not explained. I have little doubt in accepting that the amount tendered should not have included estate agents commission and that the respondent was justified in rejecting this offer and refusing to sign the sale agreement. This does not make him in contempt of court.
16. The respondent avers that in light of this dispute and the fact that he has not received his half share of the applicant's Shanduka pension interest, he is not obliged to vacate the matrimonial home.
17. The applicant points out that the agreement of settlement signed by the respondent makes no mention of the Shanduka pension interest and only refers to the Pembani Group.

18. The applicant denies that she is obliged to share the amount paid to her by Shanduka as this was paid out to her prior to the divorce and the relevant time for determining the value of the pension interests of the parties forming an asset in their joint estate is the date of their divorce.
19. In this respect reliance is placed on the matter of *De Kock v Jacobson and Another* 1999 (4) SA 346 W. This principle has been applied in several other cases.
20. However, where parties are embroiled in divorce proceedings and the applicant's pension interest is an asset of their joint estate as at the date of institution of these proceedings, where that asset is paid out to one of the parties prior to the divorce, this is a material fact that ought properly to have been disclosed to the respondent. He reasonably assumed that the applicant's pension interest had been transferred to the Pembani Group. Had it been disclosed that the respondent had withdrawn, and largely spent, the entire pension interest as at the date of divorce, I have little doubt that the respondent would not have signed the agreement of settlement.
21. In these circumstances, I have little doubt that the applicant is obliged to account to the respondent for the amount of her pension interest spent and to establish those amounts spent on the education of their children and their joint expenses.
22. This may be a ground to set aside the settlement agreement, but this is not an application before me.
23. But what is abundantly clear is that the respondent was justified in refusing to accept payment of his half share of the the substantially reduced pension payment offered to him and was not in willful default. As this was linked to his vacating the matrimonial home, he was justified in refusing to vacate the

matrimonial home. He was also entitled not accept the offer of his half share of the matrimonial home which included estate agent's commission.

24. I thus have no hesitation in finding that the respondent has not acted in contempt of court. Court orders incorporating agreements of settlements, like any documents, must be read in context in light of the factual matrix. That factual matrix includes the assumption that the applicant's pension interest which she had agreed to share in terms of the originally proposed agreement of settlement still existed and had not been withdrawn.

25. I understand the frustration of the applicant in having to share her hard earned money with the respondent when she avers he had not contributed to the joint estate. That, I am afraid is the consequence of many a marriage in community of property, but usually works the other way. Whilst this may have entitled the applicant to claim a forfeiture of benefits of their marriage in community of property, the applicant elected not to pursue this, and to settle patrimonial consequences of their marriage.

26. In the circumstances, I have no alternative but to dismiss the applicant's application with costs.

SM WENTZEL, AJ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Counsel for the applicant: S Rawat instructed by Koor Attorneys
Counsel for the respondent M.A Mavodze instructed by LP Skosana Attorneys
Date of hearing: 15 November 2017
Date of Judgment: 19 April 2018