

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG PROVINCIAL DIVISION)**

CASE NO: 46463/2007

DATE: 24 FEBRUARY 2010

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

IN THE MATTER BETWEEN:

T[...] M[...] W[...]

PLAINTIFF

And

J[...] J[...] W[...]

DEFENDANT

JUDGMENT

TOLMAY. J:

The parties in this matter were married on 22 December 1990 in terms of an Antenuptial Contract wherein the accrual system as set in in the Matrimonial Property Act. 88 of 1984, was made applicable.

All aspects pertaining to the disputes between the parties were settled bar two. namely whether the tax liability attached to the parties pensionable interest is a liability in their respective estates that should be taken into account in determining the nett accrual in their respective estates and costs. No evidence was led and the parties presented me with oral argument and on request delivered heads of argument after the matter was heard.

In the light of the aforesaid and by agreement between the parties I granted a final decree of divorce on 9 February 2010 incorporating an order regarding those aspects that the parties agreed upon and reserved

judgment regarding the outstanding disputes.

This judgment deals with the two outstanding issues on which I reserved judgment.

The Parties' Pensionable Interests

I have been asked to determine whether the tax liability on the parties' pensionable interests is a liability properly to be taken into account in determining the nett estates of the parties for purposes of calculating the accrual in the respective estates.

The parties have reached an agreement regarding the value and composition of their respective estates and I need not concern myself with that for purposes of this judgment. It is common cause that defendant will have to pay an amount to plaintiff as his estate had shown a larger accrual.

Plaintiff's counsel argued that while there is a tax liability on the pensionable interest, that tax liability is not due at date of divorce and therefore should not be regarded as a liability. In this case plaintiff did not ask that an endorsement be made nor that payment of part of the pension fund be made directly to her. Defendant argues that the tax liability should be regarded as a liability on date of divorce and should be taken into account when the accrual is determined.

The definition of "Pension Interest" in the Divorce Act, 70 of 1979 reads as follows:

“**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 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.

In *ex parte Randles: in re King v King* [1998] 2 All SA 412, the applicant was the liquidator of the joint estate of Mr and Mrs King. In terms of the order of court regulating the divorce of the parties in the divorce action, one half of the plaintiff's "pension interest" was payable to the defendant. As the parties could not agree on the value to be placed on the defendant's interest in the pension fund, the applicant approached the court for an order determining the extent of the interest. In that matter the plaintiff argued that the "benefits" in the definition of "pension interest" referred to the withdrawal benefit before tax of the member's interest, and the defendant argued that it referred to the actuarial reserve benefit. In that matter the Court held that there was no general rule that could be applied to determine what a member's interest was. The "pension interest" in sec 1 was according to that court not a reference to any pension interest, but to that conferred by the particular pension fund of the member. The Court found that the benefit in terms of the rules of the

plaintiff's pension fund was what actually accrued to the member on his notional resignation, not by what he might at any time thereafter choose to do with it.

On p 414 of the *ex parte Randles* matter the following is stated: "It may be observed at the outset, however, that the section does not deal with the case of an actual resignation by the member from the pension fund. It is a deemed or notional resignation that is made on the suppositions made. It is the benefit to which the member would have been entitled if his membership of the fund would have terminated at the time of divorce on account of his resignation (my underlining).

In the decision of **Protektor Preservation Pension Fund v Bellars 2009(4) SA 455 (D&CLD) at pp 458, paras 12 and 13**, the learned judge states the following:

"[12] Now as pointed out by the applicant's deponent in the founding affidavit the said s 7(8) was designed to ensure that there be an equitable division of assets between the spouses on divorce. Thus the portion of the pension interests that falls to be transferred to the non-member spouse is based on its valuation as at the date of the divorce.

[13] The definition of 'pension interest' speaks of a termination of membership of the fund on account of resignation from office'. Thus the valuation of the pension interest was based on a deemed resignation of the member from the scheme."

Both the aforesaid decisions, correctly in my opinion, indicated that a party's "pension interest" should be determined as at date of divorce and should be determined by the benefit to which the member would have been entitled if he resigned.

The aforesaid decisions did not deal with the calculation of the accrual in an estate.

In terms of sec 3 of the Matrimonial Property Act, 88 of 1984 the claim to accrual sharing arises only at the date of dissolution of the marriage. Therefore it is only at this date that calculations can be made as to the accrual of the respective estates. In terms of sec 4 of the Matrimonial Property Act the accrual of the estate of the spouse is the amount by which the nett value of his/her estate exceeds the nett value of his/her estate at the commencement of the marriage.

Section 4(1)(a) of the Matrimonial Property Act *supra* reads as follows:

"4(1)(a) The accrual of the estate of a spouse is the amount by which the nett value of his estate at the dissolution of his marriage exceeds the nett value of his estate at the commencement of that marriage."

In the South African Concise Oxford Dictionary, the word “**net**” or “**nett**” is described as follows:

“(of an amount, value, or price) remaining after a deduction of tax or other contributions.”

In the Dictionary of Legal Words and Phrases - Claassen, - Vol 3 the word "net" and "nett" is described as meaning “this term means ‘free from, or subject to any deduction’” or "clear of all deductions”.

In the light of the fact that the accrual should be determined at date of divorce the pension interest could only be determined at that same date. The valuation should be based on a deemed resignation, and therefore the definition of “pension interest” in sec 1 of the divorce Act should be read to include the after tax withdrawal benefit that would be payable to a member if he or she had opted to take a total withdrawal benefit as at date of divorce, because only that could be the nett accrual as at date of divorce.

It is common cause between the parties that there is a tax liability on their respective pensionable interests. I must point out that the rules of the respective pension funds were not made available to me. The amount to be taxed on the pensionable interests and how it will be deducted is irrelevant for purposes hereof as I have not been asked to decide thereon.

The fact that the defendant may or may not use the funds in the Pension Fund to enable him to pay the amount owing to the plaintiff is irrelevant, for purposes of determining the accrual the important consideration is whether the nett accrual of the estate has been correctly determined.

In order to determine the accrual the parties’ nett interest will have to be determined at date of divorce. Therefore the tax liability as at date of divorce must be taken into account when the accrual is calculated.

Costs

Plaintiff argued that as she was substantially successful defendant should pay the costs of the action. It was also contended that defendant up to the very last minute was not forthcoming about the true value of his estate, which necessitated her to continue with her claim for rehabilitative maintenance. Defendant argued that each party should pay his/her own costs.

I have a discretion regarding costs and sec 10 of the Divorce Act seems to broaden such discretion.

It would seem that the defendant did not reveal all his assets and this did result in some of the disputes not being resolved earlier. On the other hand defendant was successful regarding the issue that needed to be determined by me and it would seem that the matter would have proceeded to trial irrespective of the maintenance claim. The defendant is the party with the larger estate and this is also taken into consideration in the exercise of my discretion. Consequently, and in the exercise of my discretion I order the defendant to

pay 60% of the plaintiff's costs.

Consequently the following order is made:

1. The tax liability attached to the parties pensionable interests is a liability in their respective estates and should be taken into account in determining the nett accrual of the respective estates.

2. Defendant is ordered to pay 60% of the plaintiff's taxed party and party costs.

R G TOLMAY

JUDGE OF THE HIGH COURT

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DATE OF TRIAL: 9 FEBRUARY 2010

DATE OF JUDGMENT: 24 FEBRUARY 2010

JUDGE: TOLMAY RG