

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 1286/2020

Not reportable

In the matter between:

Z[....] V[....]

Applicant

and

GOVERNEMENT EMPLOYEES PENSION FUND (GEPF)

First Respondent

D[....] P[....] V[....]

Second Respondent

JUDGMENT

Goosen J:

[1] This matter concerns the proper interpretation and implementation of a settlement agreement made an order of court. The relevant clause required the first respondent to make payment of an agreed amount of the second respondent's pension interest in it, to the applicant. The first respondent paid out the agreed amount less tax payable to the South African Revenue Service notwithstanding the term of the agreement which stipulated that the amount to be paid was nett of tax.

[2] The applicant and second respondent were married to each other out of community of property but subject to the accrual system. Upon divorce the applicant was entitled to payment of an amount of R1 750 000 in respect of the accrual. The

applicant and the second respondent concluded a settlement agreement which included provisions for the accrual payment. The settlement agreement was made an order of court upon divorce on 21 July 2020.

[3] Clause 3.4 of the Deed of Settlement sets out the agreement in relation to the second respondent's pension interest, as follows:

“34.1 It is recorded that the Defendant holds a Pension Interest as defined in Section 1 of the Divorce Act 70 of 1979 (as amended) (hereinafter called the ‘Divorce Act’), read together with the Pension Fund Act 24 of 1956 as amended (hereinafter the Pension Act) in the Government Employees Pension Fund by virtue of his employment at the South African Police Service, (hereinafter referred to as “the Fund”).

3.4.2 The Plaintiff is hereby awarded a nett amount of R1 750 000.00 (One Million Seven Hundred and Fifty Thousand Rand) of the Defendant's aforesaid Pension Interest, which is deemed to accrue to the Defendant, together with the interest on the assigned amount at Provident Fund return from the expiry of the sixty (60) day period calculated in accordance with the Provision of Sections 37(D)(1)(d)(i) and 37(D)(4) of the Pension Fund Act, but not any other interest or growth.

3.4.3 The Fund Administrators are hereby ordered and directed to make the abovementioned nett deductions with the income tax payable on this amount to be paid by the Defendant so as to ensure that the Plaintiff receives the exact nett amount of R1 750 000. 00.

3.4.3 (sic) The Defendant agrees that the amount of R1 750 000.00 of his Pension Interest, together with the income tax thereon, shall be deducted from his members' interest, upon receipt of the final decree of divorce. He thereby authorises the Plaintiff irrevocably to submit a copy of the final decree of divorce incorporating the Deed of Settlement to the said Fund.”

[4] It is common cause that on 18 February 2021 the first respondent paid an amount of R1 430 360.68 into the applicant's bank account as provided in the payment provisions of the Deed of Settlement. It is common cause that the first respondent deducted an amount from that payable to the applicant for payment of income tax. It appears from a transaction record of the payment, as explained by the first respondent in its answering affidavit, that the pension benefit assignment amount was R1 750 000.00. To this was added an accrued interest amount due to the second respondent of R19 710.08 (as provided for in clause 3.4.1 above). The total of R1 769 710.08 was treated as the "divorce gratuity". From this amount income tax of R339 349.40 was deducted resulting in payment of R1 430 360.68 to the applicant.

[5] The applicant seeks an order declaring that she is entitled to payment of an amount of R1 750 000.00 as provided in the Settlement Agreement. She further seeks payment of an amount of R319 360.56 being the balance of the payment due to her. I pause to mention that the amount claimed in the notice of motion as the balance due to her is patently incorrect. In light of the amount actually paid the applicant would be entitled to payment of R319 639.32 in the event that she succeeds.

[6] The first respondent opposes the application on the basis that the declaratory relief would exempt the applicant from the payment of tax. It was argued that such an order would be unlawful. That is so, the argument went because the provisions of section 2(1)(b) of the Second Schedule to the **Income Tax Act**, 56 of 1962 deems the gratuity from a pension benefit to form part of a person's taxable income, and the Fourth Schedule to the **Income Tax Act** obliges the first respondent to withhold employees tax, such order would be unlawful. The first respondent went further to suggest that the order incorporating the terms of the Settlement Agreement is itself unlawful since it sanctions the non-payment of income tax.

[7] The starting point for resolution of the dispute is the language of the Settlement Agreement. It is upon consideration, the plain or ordinary meaning of the words used and the context in which they occur that the agreement is to be interpreted.

[8] The language of clause 3.4.3 is plain and unambiguous. The use of the term nett clearly contemplates that the amount to be received is free of any deductions. The second clause of the sentence takes this beyond doubt where it provides, that,

“ . . . the income tax to be paid on this amount [i.e. the nett amount of R1 750 000.00] to be payable by the Defendant so as to ensure that the Plaintiff receives the exact nett amount of R1 750 000.00.”

[9] The second numbered clause 3.4.3 further sets out the obligation which rests upon the respondent in terms of the court order. It provides in the first sentence that,

“The Defendant agrees that the amount of R1 750 000.00 of his Pension Interest, together with the income tax thereon, shall be deducted from his members’ interest . . . “(emphasis supplied)

[10] When these clauses are read in their totality and when regard is had to the purpose of the agreement, (1) the applicant and second respondent agreed that the applicant should receive payment of R1 750 000.00; (2) that the amount due to her was to be payable out of his pension interest; (3) that the first respondent would deduct from the second respondent R1 750 000.00 plus income tax payable on that amount; and (4) pay to the applicant the nett amount of R1 750 000.00.

[11] The suggestion by counsel for the first respondent that the agreement sanctions the non-payment of tax due by the applicant is spurious. Clause 3.4.3 provides that the tax payable will be paid by the second respondent – as a charge against his member’s interest in the pension fund. There is nothing in the **Income Tax Act** which precludes such an arrangement. Counsel could point to no such prohibition.

[12] The further argument advanced by counsel to the effect that the first respondent was obliged to deduct the tax from the amount of R1 750 000.00 is similarly without any merit. It ignores the plain language of the agreement which was

made an order of court. Counsel's reliance upon *Russouw v Reid and Another*¹ and *Fourie v Eskom Pension and Provident Fund*² is misplaced.

[13] In neither of those cases was any reference made to payment of a specified nett amount. The settlement agreements made reference to payment of a percentage of the pension interest and no reference was made to the payment of tax. These matters are entirely distinguishable upon the facts.

[14] In any event the liability for payment of the tax accrues to the member of the pension fund in terms of section 2B of Schedule of the **Income Tax Act** (see in this regard *Russouw v Reid supra*) at par [15]). The stipulated payment of the tax by the second respondent is, contrary to the argument advanced by first respondent's counsel, entirely consonant with the legislative provisions relating to the payment of tax.

[15] It was not the first respondent's case that the court order in this matter placed upon it an obligation that was impossible to fulfil, in the sense that it was incapable of determining the amount of tax payable. Instead the first respondent confined itself to the alleged unlawfulness of the agreement. As I have already indicated that challenge is without substance.

[16] It follows that the applicant is entitled to the relief she seeks. For the reasons indicated at the outset the balance payable to her stands to be corrected. The applicant sought only the usual costs order. In the light of the defence raised by the first respondent I may have been inclined to a punitive costs order. However, since one was not sought the ordinary order will follow.

[17] I make the following order:

1. It is declared that the applicant is entitled to receive payment of a nett amount of R1 750 000.00 payable by the first respondent from the proceeds of the second respondent's pension interest, after provision is made for

¹ [2011] 3 All SA 106 (GSJ)

² (18/1355) [2019] ZAGPJHC 188 (6 June 2019)

payment of tax on that amount from the second respondent's member interest in the first respondent Pension Fund.

2. The first respondent is ordered to pay to the applicant the sum of R319 639.32 being the balance of the nett amount of R1 750 000.00 due to the applicant within 30 days of the date of this order.

3. The first respondent is ordered to pay the costs of the application.

G.G. GOOSEN
JUDGE OF THE HIGH COURT

APPEARANCES

Obo the Applicant	:	Adv L. Gagiano
Instructed by	:	Annali Erasmus Inc
Obo the Respondent	:	Adv K T Ntsewa
Instructed by	:	Pagdens Attorneys
Heard	:	18 November 2021
Delivered	:	7 December 2021