

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

CASE NUMBER: 4342/20

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGE: NO

(3) REVISED: NO

2 June 2023

In the matter between:

M[...] G[...] N[...]

Applicant

and

M[...] S[...] N[...]

Respondent

Heard: 1 June 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and uploaded on case lines. The date and time for hand-down is deemed to be 10h00 on 02 June 2023.

JUDGMENT

LE GRANGE AJ:

[1] Before me is an application in terms of Uniform Rule 42(l)(b) for the variation of an order granted by this court on 14 November 2022 by Collis J.

[2] The respondent is of the view (*in limine*) that the relief sought or that should be sought should be done by way of an appeal.

[3] I find no merits in this argument as it is clear from the judgement, order and the relief sought that the relief is aimed not at attacking the decision of the court but at the clarification thereof by way of variation, so that only one meaning could be ascribed to it (as more fully set out hereinunder).

[4] The main issue then before me is whether the order contains an ambiguity (to the extent that it can have more than one meaning) and if so, if, and how, it should be varied.

Order

[5] The order of Collis J read as follows:-

37.1 A decree of divorce.

37.2 It is ordered that the Plaintiff being a non-member spouse of the Defendant's pension interest held at the Government Employees Pension Fund with Membership number 9[...], Employer Code G[...] 1[...] as defined in Section 1 of the Divorce Act 70 of 1970 is paid an amount of R 1 233 654 (One Million Two Hundred and Thirty Three Thousand Six Hundred and Fifty Four Rand).

37.3 This amount as mentioned on paragraph 1.2 above is to be paid into the Plaintiffs nominated account namely, Wolvaart Incorporated, Trust Account held at Standard Bank Menlyn Branch Code 0[...], Account Number: 0[...].

37.4 It is ordered that the Government Pension Fund, is to endorse its records to reflect the Plaintiffs entitlement in terms of this order pending payment or transfer to the Plaintiff of the amount of R 1 233 654.00 of the pension interest of the Defendant in terms of the provisions of section 37D (4)

of the Pension Funds Act 24 of 1956 after receipt of notification by the Plaintiff or the Defendant.

37.5 Division of the remainder of the joint estate.

37.6 Each party to pay its own costs.

The ambiguity

[6] The argument goes (with reference to 37.2 - 37.4) that it is unclear, from a normal reading of the order:- (i) whether the amount of R 1 200 000-00 (being the applicant's ("plaintiff") living annuity at the time of divorce) was taken into account in the calculation of the amount of R 1 233 654-00 which the respondent ("defendant") was ordered to pay (in division) to the plaintiff in order to retain her entire pension fund sum (as her part of the division); or (ii) whether the living annuity was not so included in which event it should be included in the remainder of the joint estate, to be divided in terms of 37.5 above.

[7] The practical effect of the two scenarios is that a division in accordance with:- scenario (i), would render that the parties receive an equal amount of R 2 433 308-00; and scenario (ii), would render the division disproportionate (to the amount of R 1 200 000) in that the plaintiff would receive R 1 833 654-00 million while the defendant receives R 3 033 654-00.

[8] The obvious question then, which will settle the matter, is whether the Court had as purpose, the equal distribution of the joint estate or not.

[9] To this a further obvious question sprang to mind i.e. where the (certainly not a thumb suck) amount in the order at 37.2 - 37.4, came from and/or how it was calculated.

Judgement considered

[10] From the judgement it is clear that:- (i) the plaintiff had a balance (asset) financial interest of R 1 200 000-00 in a living annuity, being the proceeds from a pension pay-out less the settlement of various debts of the joint estate; while (ii) the defendant had a much higher (asset) interest in a Pension Fund of R 3 667 308-00; and that (iii) the court was satisfied that no forfeiture should be applied, which can only mean one thing i.e. that the court was of the view that the parties had to be treated equally in dividing the joint fruits gathered by them during their marriage.

[11] To the second obvious question, I enquired from the legal counsels who were also both in attendance at the divorce trial (as is evident from the judgement and confirmed by them during argument) as to how the court came about the amount of R 1 233 654-00 that had to be paid by the defendant to the plaintiff.

[12] Counsel for the plaintiff indicated that she clearly remembers that this amount (exact to the rand) came about from an in court calculation (done on 5 May 2022, the court virtually in session on the last day of the trial) which was purely aimed at attaining an equal division of the joint estate by incorporating both parties' respective financial interests as indicated above, and as follows:

Defendant's Pension Fund	R 3 667 308-00
Plus Plaintiffs Living Annuity	R 1 200 000-00
Total	R 4 867 308-00
Divided equally	R 2 433 654-00
<u>Less</u> Plaintiffs Living Annuity	R 1 200 000-00
Total	R 1 233 654-00

[13] Counsel for the defendant indicated that he cannot remember the argument specifically nor recall how the calculation was done or how the amount was arrived at.

[14] I have no reason to doubt the recollection of either officers of the court before me but can find, that what was remembered, coincide with my initial view that the court had at aim the equal division of the estate, in fact to the last rand.

Order

In the result I make the following order:-

1. The application succeeds with costs.
2. The order of Collis J is varied by deleting 37.5 thereof and replacing it with:

'37.5 That the remainder of the joint estate (to the exclusion of the defendant's pension fund and the plaintiffs living annuity, held at 10X Living Annuity, which are already accounted for in the calculation of the above amount of R 1 233 654-00) be divided.'

AJ LE GRANGE
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the applicant: Adv. T Engelbrecht on the instruction of Wolvaardt Attorneys.

For the respondent: Adv Lazarus on the instruction of Shapiro & Ledwaba Inc.