IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 66901/2018

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 1 September 2023

Signature:

In the matter between:

I[...] N[...] M[...] Applicant

And

M[...] J[...] M[...] Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] During divorce proceedings, the parties entered into a settlement agreement which was duly made an order of court by incorporation into the decree of divorce. The applicant now applies for an order varying some clauses in the settlement agreement which pertains to the amount of her agreed interest in the pension fund of her erstwhile husband. The husband opposes the application.

[2] More particularly, the applicant is desirous to have the amount in the agreement varied from R1 000 000,00 (One million rand) to R 1 323 437, 50 (One million and thee hundred and twenty-three thousand four hundred and thirty-seven rand fifty cents).

[3] Applicant's reason for this about turn is that she would like the respondent, who is the member in the pension fund to foot the tax bill payable in terms of the applicable laws, so that she receives a net amount of R1million.

[4] To this end, the applicant through her attorneys enlisted the services of a professional accountant Ms. Olive Irungu of ONB Business Consultants to provide her with a formula and/or a table which in terms of the Income Tax Act sets out her projected tax liability for her to receive a lump sum of R1 000 000.00 "after tax".

[5] A slight complicating factor in the leadup to the parties signing the settlement agreement has been the fact that during the negotiations the applicant's attorney inserted the phrase "after tax" just next to the amount in the clause. This was at a meeting of both parties in the presence of their legal representatives.

[6] The Applicant seeks an order to vary clause 9.2 of the settlement to read as follows:

> *"In terms of section 7[7] of the Divorce Act, the pension interest is deemed to form part of the plaintiff's assets. In terms of section 7[8][a] of the Divorce Act, it is ordered that Rl 323 437.50 [One Million Three Hundred and Twenty-Three Thousand and Thirty-Seven Rand and Fifty Cents] of the Defendant's pension interest, with number 7408 in the Germiston Municipal Retirement Fund as at the date of divorce be assigned to the plaintiff."*

[7] The Applicant also seeks an order to vary clause 9.3 of the Settlement Agreement to read as follows:

"The Germiston Municipality Retirement Fund is ordered to endorse its records to the effect that the plaintiff is entitled to Rl 323 437.50 [One Million Three Hundred and Twenty-Three Thousand Four Hundred and Thirty-Seven Rand and Fifty Cents] of the Defendant's pension interest held therein as at the date of divorce."

[8] The Applicant also seeks an order to vary clause 9.4 of the Settlement agreement *to read as follows:*

"The Germiston Municipality Retirement Fund is ordered to calculate the plaintiffs Rl 323 437.50 [One Million Three Hundred and Twenty-Three Thousand Four Hundred and Thirty-Seven Rand and Fifty Cents] share of the Defendant's pension interest as at the date of divorce and pay it directly to the Plaintiff or transfer it."

[9] The respondent opposes this application, stating that he at all material times during the negotiations and conclusion of the settlement agreement intended the applicant to receive R1 million Rand from his pension benefits. He expresses it thus in his opposing affidavit:

"The applicant and her legal representatives agreed to the above (i.e. that provision is made that the applicant be entitled to R1 000 000.00 of my pension interest in the Fund as opposed to me paying a lump-sum of R1 000 000.00 to the applicant directly), and my legal representatives together with the applicant's legal representatives drew up the settlement agreement at the Attorney's Association in Room 5.15 of the High Court Building, 220 Madiba Street, Pretoria, while the matter stood down for purposes of settlement;"[1]

And

[1] Paragraph 18.7 of respondent's opposing affidavit.

"I confirm that no mention was initially made of tax or that the issue of tax formed part of the settlement negotiations between the applicant and I. I am advised that upon drawing up the settlement agreement, and once same was almost finalised, the applicant's attorney of record (seemingly without instructions) suggested that the words "after tax" be inserted in clause 9.2 of the settlement agreement in order to ensure that the applicant receives the full R1 000 000.00 from the Fund, and does not receive a lessor amount than that in the event that any taxes are deducted or payable from the amount during the transaction."[2]

[10] The mainstay of the respondent's opposition to the application is that while he did not raise any objection to the insertion of the words "after tax" during the negotiations, there was a mistake common to the parties in understanding the meaning assigned thereto.

[11] This is in my opinion not borne out by the circumstances. Firstly, the respondent wanted *"…to ensure that the applicant receives the full R1 000 000.00 form the Fund…"*. Those are his sentiments as expressed in his answering affidavit. It is this lump sum which the applicant is endeavouring to protect by means of the instant application.

[12] The parties were legally represented during the divorce hearing and the negotiations attendant thereto. The respondent's attorney drafted the settlement agreement. While the courts are loathe to penalize a litigant for their attorney's ineptitude, Steyn CJ held that: *"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered…the attorney, after all, is the representative whom the litigant has chosen for himself…"* [3]

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[2] Paragraph 18.8 of respondent's opposing affidavit.

[3] Salojee and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) at p141.

[13] It is trite that pension payments and withdrawals inevitably attract tax liability. More particularly, it is a reality of life that the non-member spouse will be taxed on her share of the member's- pension benefits that she receives.

[14] The argument regarding a mistake common to the parties is conveniently contrived and cannot avail the respondent.

[15] In *GN v JN* 2017 [1] SA 342 [SCA] the Supreme Court of Appeal found that the pension interest of a member spouse as at date of divorce is by operation of law part of the joint estate for the purpose of the division of the assets between the parties. The purpose of the settlement agreement between the parties, in particular clause 12, was to bring about a "full and final settlement" and effect a clean break. This underscores the rationality of ensuring that the applicant receives what is reasonably due to her in terms of proprietary benefits post the marriage.

[16] The applicant has made a compelling case for the relief sought. It follows that she should not be out of pocket because of this application. Costs will follow the outcome of the matter.

[17] I make the following order:

1. The application for variation succeeds.

2. The decree of divorce granted by the Honourable Justice Van Der Westhuizen on 01 June 2021 under case number 66901/2018 is varied as follows:

   a. By deleting clause 9.2 of the Settlement Agreement and replacing with:

In terms of Section 7 (7) of the Divorce Act; the pension interest is deemed to form part of the Plaintiff assets. In terms of Section 7(8)(a) of the Divorce Act, it is *ordered that R 1 323 437.50 (One Million Three Hundred and Twenty-Three Thousand, Four Hundred and Thirty-Seven Rand and Fifty Cents) of the Defendant's Pension Interest, with number* ***7408*** *in the* ***Germiston Municipal Retirement Fund*** *as at the date of divorce be assigned to the Plaintiff.*

b. By deleting clause 9.3 of the Settlement Agreement and replacing with:

"The Germiston Municipality Retirement Fund is ordered to endorse its records to the effect that the plaintiff is entitled to R1 323 437.50 [One Million Three Hundred and Twenty-Three Thousand Four Hundred and Thirty-Seven Rand and Fifty Cents] of the Defendant's pension interest held therein as at the date of divorce."

c. By deleting clause 9.4 of the Settlement Agreement and replacing with:

"The Germiston Municipality Retirement Fund is ordered to calculate the plaintiffs R1 323 437.50 (One Million Three Hundred and Twenty-Three Thousand Four Hundred and Thirty-Seven Rand and Fifty Cents) share of the Defendant's pension interest as at the date of divorce and pay it directly to the Plaintiff or transfer it."

3. The respondent is ordered to pay the applicant's costs for this application.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of hearing: 06 February 2023
Date of Judgment: 01 September 2023

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Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 01 September 2023.