

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: AR 314/11

In the matter between;

L D M

Appellant

vs

D P M

Respondent

JUDGMENT

K PILLAY J

This is an appeal against a judgment and order of Magistrate G J Muller of Mooi River Magistrate's Court granting absolution from the instance at the close of Plaintiff's case, with costs.

BACKGROUND FACTS

The Appellant and the Respondent were previously married to each other. They divorced on 5 May 2004. On 19 March 2004, prior to the finalization of divorce proceedings, the parties concluded a written deed of settlement ("Settlement Agreement"), which agreement sets out the terms and conditions of their divorce, including that relating to the Respondent's pension interest. Specifically clause 4.5 of the settlement agreement, provides as follows:

"David has a pension with his employer and agrees that Lynne will be entitled to 50% of the amount thereof, calculated as at the date of divorce. This agreement is a formal consent by David that this be noted by his employer against its records relating to his rights to the pension."

At the time the divorce order was granted, it is not in dispute, that the Respondent's pension fund was valued at R90 573.91. On 31 August 2006, the Respondent was medically boarded from his employment and sometime during September 2006, he was paid out his pension fund proceeds. As absolution was granted by the Magistrate's Court, only the Appellant's testimony is on record in this appeal.

It is clear from her testimony that the Appellant and the Respondent had minimal communication, which consisted largely of messages transmitted through their children or cell phone text messages. She stated that she was not informed that the Respondent's pension proceeds had been paid to him. She merely learnt around September 2006, from one of her children that the Respondent was medically boarded.

She was asked by her legal representative, whether, upon hearing he was medically boarded, she made any enquiries with the Defendant with regard to whether his pension had been paid to him, her response was as follows:

"I didn't at that point because I understood that as long as he was receiving payment from the Municipality, which I understood he was, and until such date as he actually left the Municipality, that pension would not fall due. So therefore there was no need for me to make any enquiries on that."

During 2008, the Appellant applied for a maintenance order against the Respondent, which necessitated an investigation into the Respondent's financial affairs, it was this investigation, conducted through the Appellant's attorney, which led to the discovery that the Respondent had in fact been paid out his pension proceeds in September 2006.

As a consequence thereof, the Appellant issued summons against the Respondent on 28 October 2009, for her 50% share of the pension proceeds. The matter was heard on 24 February 2011.

At the close of the Plaintiff's case, the Respondent applied for absolution from the instance on *inter alia* two essential grounds, firstly that the settlement agreement did not create an obligation on him to do anything in respect of making payment to the Appellant. That the effect of Clause 4.5 was merely to grant permission to the Appellant to take steps which would result in "*a recordal of this acknowledgement of the entitlement in the records of the pension fund*".

Secondly, that the claim had prescribed on the basis that the debt became due in September 2006 when the pension proceeds were paid out to the Respondent and that summons was only issued in October 2009 (more than three years later).

Since the court *a quo* found in favour of the Respondent's argument on the construction of clause 4.5 which resulted in the grant of an order of absolution from the instance, it determined it unnecessary to consider the defence of prescription.

The Court *a quo*'s reasoning in granting absolution on the first ground is as follows:

"Paragraph 4.5's clear meaning is that it is a formal consent to the effect that steps can be taken to note the plaintiff's entitlement to 50% of the defendant's pension interest in the records of his pension fund."

The Court *a quo* then made the following observation:

"In terms of Section 7(8)(a)(i) of the Divorce Act 70 of 1979 a divorce court is empowered to make an order to the effect that the part of the pension interest of the member to be assigned to the other party be paid out to that other party, and to order further that the registrar of the court notify the relevant fund that an endorsement should be made, in terms of section 37D(4)(a)(i) (aa) and (bb) of the Pension Funds Act 24 of 1956 the pension fund shall then be under an obligation to deduct the amount awarded to the non-member spouse in terms of the order."

The Court *a quo* then went on to find that in the absence of an order in terms of Section 7(8)(a)(i) of the Divorce Act¹ the Appellant was under a duty in terms of Rule 41(4) to apply for such an order in terms of the settlement agreement in order to notify the pension fund of her 50% entitlement to the pension proceeds. For this reason, the settlement agreement itself did not create an obligation on the Respondent to do anything as regards making payment to the Appellant of these proceeds.

Consequently the cardinal issues which fall for consideration are:

- (1) Whether the Court *a quo* was correct in the interpretation it placed upon Clause 4.5 of the Divorce Settlement.

¹ Act 70 of 1979

(2) Whether the defendant discharged the onus he bore to prove that the claim had in fact prescribed.

It is well established that settlement agreements are to be interpreted according to the basic principles of interpretation of contracts.² The intention of the parties was to be garnered from the language of the agreement in its contextual matrix, in the light of background facts, and in the light of admissible evidence.

Where parties enter into settlement agreements, their remedy is to sue on the agreement, obtain judgment and then execute.³

An analysis of clause 4.5, reveals that it consists of two sentences; the first which records that the Appellant is "*entitled*" to 50% of the pension proceeds, the second is that the Respondent "*consents*" to this settlement being noted. As correctly submitted by Counsel for the Appellant, both are severable from the other. The first grants the Appellant a right to claim the proceeds while the second provides her with a mechanism to protect that right.

Indeed, as submitted, each sentence retains its own discrete meaning whether it is read alone, or whether it is read in conjunction with the other sentence.

The first sentence;

"David has a pension fund with his employer and agrees that

² Engelbrecht and Another NNO v Senwes Ltd 2007(3) SA 29 (SCA)

³ Mansell v Mansell 1953(3) SA 716 (W) at 712 (B)

Lynn will be entitled to 50% of the amount thereof, calculated as at the date of divorce"

The use of the word "*will*" clearly connotes that the Appellant's claim to 50% would become due when the pension benefit accrued to the Respondent.

The second sentence:

"This agreement is a formal consent by David that this be noted by his employer against its records relating to his rights to the pension"

This merely records that the Respondent provided a formal consent for his employer to record the Appellant's entitlement to 50% of the pension benefit.

It simply enables the Appellant to safeguard her interest by asking the Pension Fund to record her 50% entitlement, calculated as at the date of divorce and that, that amount should be paid to her when it accrues.

In *Maharaj v Maharaj*⁴ a similar argument to that accepted by the Court *a quo* was argued. Counsel in that case, relying on *Sempapalele v Sempapalele and Another*,⁵ argued that if no order has been obtained in terms of the Divorce Act when the divorce was granted, a non-member spouse in a marriage in community of property could not claim any of the member spouse's pension fund proceeds.

Magld J, doubting that this was indeed the *ratio* of the case,

⁴ 2002 (2) SA 648 (D)

⁵ 2001 (2) SA 306 (D)

nevertheless was unable to agree with the notion that where no reference is made to a spouse's pension benefit or interest in a divorce order, the non-member spouse in a marriage in community of property is forever precluded from claiming half of the pension.

In this case the Appellant's failure to take steps to protect that right by getting the Respondent's employer to note "*against its records*", the terms of the agreement, does not in my view extinguish her right to 50% of his pension interest.

In fact in *Commissioner for Inland Revenue v Pretorius*⁶ the Court held that the expression "*entitled thereto*" in its ordinary sense meant "*having a rightful claim thereto*".

Section 7(8)(a)(i) of the Divorce Act empowers the divorce court to order a pension fund to pay any part of the pension interest which is due to the spouse of a member of the fund directly to the non-member spouse when the pension benefit accrues to the member spouse.

It is common practise for Courts to direct the Registrar of the Court to notify the pension fund concerned to make the relevant endorsement in the funds records.

The fact that no order is made in terms of Section 7(8)(a) of the Divorce Act at the time of the divorce, does not preclude the non-member spouse from later making a claim against the other former spouse for a portion of the pension proceeds,

Therefore, as correctly, submitted the conclusion reached by the Court *a quo* that: ,

".....there was no indication that the divorce court made any

⁶ 1986 (1) SA 238 (A) @248 F-G

order to this effect... consequently, in terms of rule 41(4) of the Uniform Rules of Court the duty rested on [the Appellant] to apply for an order in terms of the written agreement in order to notify the pension fund of her entitlement in respect of the pension interest"

is a complete *non sequitur*.

In addition it is clear that the Court *a quo* did not consider the scope and ambit of Rule 41(4) which provides;

"any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least five days' notice to all interested parties".

It was correctly asserted that Rule 41(4) contemplates a situation where one of the parties to the settlement agreement fails to perform in terms of the settlement agreement. In that event, the aggrieved party can apply for judgment in terms of the settlement agreement. The Pension Fund was not a party to the settlement agreement. A *fortiori* it was not a party that failed to perform in terms of a settlement agreement. There was no relief that the Appellant could have obtained against the ' Pension Fund by making an application in terms of Rule 41(4). Even had the Pension Fund notionally been a party to the settlement agreement, it could not be ordered to do anything in the way of *"noting against its records relating to [the Respondent's rights] to the pension"... that [the Appellant] would be entitled to 50% of the amount thereof calculated as at the date of divorce"* as contemplated by clause 4.5 of the settlement agreement. Nor could it be ordered to carry out any of the actions listed in section 37D(4)(a) and (b) of the Pension

Funds Act 24 of 1956, because it would only be obliged to do so if an order had been made by the divorce court in terms of section 7(8)(a)(i) of the Divorce Act. The provisions of section 37D(4)(a) and (b) of the Pension Funds Act 24 of 1956 apply only *"for the purpose of section 7(8)(a)(i) of the Divorce Act*, that is, they apply only if an order has been made in terms of section 7(8)(a)(i) of the Divorce Act. Where no order is made the Pension Funds Act has no application.

The Appellant, being the aggrieved party could have applied for judgment in terms of the Settlement Agreement.

In my view, the first sentence of Clause 4.5 namely:

"David has a pension fund with his employer and agrees that Lynn will be entitled to 50% of the amount thereof, calculated as at the date of divorce", created an obligation on the Respondent to pay over to the Appellant or as submitted to cause to be paid over to the Appellant an amount equal to 50% of the Respondent's interest in the Pension Fund, as at the date of divorce when the benefit accrued to him.

He failed to do so.

At the hearing of the appeal, Counsel for the Respondent raised the issue that Appellant's claim as pleaded does not establish an obligation on the Respondent to make payment to her. Given that the Applicant has based her claim on a breach of contract, it is asserted that she accordingly bears the onus of proving the terms of the contract, including terms in the negative.

Generally, pleadings in the Magistrate's Court are not required to be

drafted with the same precision as in the High Courts, and some indulgence is afforded to litigants in this regard, provided that the particulars of claim are set out in such a way that liability nevertheless follows as a necessary consequence of the allegations therein. *Tuckers Land Development Corporation (Pty) Ltd v Loots & Nees and Korving v Louters*.⁷ Where appropriate, a Court can also infer an allegation that is not expressly contained in the summons from an allegation that is *Ruto Flour Mills (Pty) Ltd v Moriates*⁸

It is so that the pleadings were not a model of clarity. However, it is clear from the particulars of claim that the Plaintiff alleges that a settlement agreement was entered into by the parties, in terms whereof she was entitled to 50% of the Respondent's pension, and that the Defendant breached this agreement. In his plea, the Respondent as Defendant does no more than merely deny the Plaintiff's allegation of breach, and puts her to the proof thereof.

This issue was not raised before the Court *a quo*. The parties principal argument related to the interpretation of Clause 4.5. It is not open to the Respondent to now take issue with the pleadings.

In my view, the Respondent was not in any way prejudiced by the manner in which the pleadings were drawn.

Counsel for the Respondent has urged the Court to decide the issue of prescription on the available evidence. This issue was raised as a special plea to the claim. The Court *a quo* did not pronounce on this issue.

In terms of the Prescription Act ('the Act')⁹, the running of prescription

⁷ *Tuckers Land Development Corporation (Pty) Ltd v Loots* 1981 (4) S 260 T @ 263 G-H
Nees and Korving v Louters 1950 (4) SA 300 (N) @ 302 C

⁸ *Ruto Flour Mills (Pty) Ltd v Moriates* 1957 (3) SA 113 (T)@ 1176 G-H

⁹ Act 65 of 1969

of a debt begins when the debt becomes due, and in the case of an ordinary debt, the debt becomes extinguished after a period of 3 years.

Section 12(3) of the Act provides;

"A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises. Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care"

The debtor claiming prescription in these circumstances, bears the onus not only, to allege but also to prove such knowledge or deemed knowledge.

In order to be regarded as having obtained actual knowledge of the facts for the purposes of Section 12(3) of the Act, the knowledge is required to be more than merely a suspicion, supposition or opinion. As aptly stated in *Minister of Finance and Others v Gore* NO:10

It is well established in our law that:

(a) Knowledge is not confined to the mental state of awareness of facts that is produced by personally witnessing or participating in events, or by being the direct recipient of first-hand evidence about them.

(b) It extends to a conviction or belief that is engendered by or inferred from attendant circumstances.

(c) On the other hand, mere suspicion not amounting to conviction or belief justifiably inferred from attendant circumstances does not amount to knowledge.

It follows that belief that is without apparent warrant is not knowledge, nor is assertion an unjustified suspicion, however passionately harboured; still less, is vehemently controverted allegation or subjective conviction.¹

The Courts require a creditor not simply to take a completely passive role in respect of acquiring knowledge, but to act diligently.

The reason for this was postulated by *Diemon JA* in *Gericke v Sack*¹¹ as follows:

"The act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons - she is given a generous three years in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not to be content to pay a purely passive role. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay. The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run."

¹¹ 1978 (1) SA828 A

The Appellant in this matter did not know that the Respondent had received the proceeds of his pension at the time he did and consequently could not have known in September 2006, that the debt owing to her had in fact become due.

In fact, the only evidence before the Court *a quo* was that the Defendant was medically boarded on 31 August 2006. There is no evidence on record on as to exactly when the pension proceeds were paid out, given that pension proceeds are not usually paid out on an employees last day of service.

The Appellant's failure to take steps to ascertain when the pension proceeds were paid out when she heard about his being boarded in September 2006, appears to stem from two incorrect assumptions she made firstly that the Respondent could not after having been boarded, continue to receive an income once the pension proceeds were paid out, (she was aware that he was still receiving an income) and secondly she believed that her entitlement to 50% of the pension proceeds was noted with the Respondent's pension fund, and that she would therefore be contacted by the Pension Fund in respect of her share. As she had not heard from them, she assumed he had not received his pension fund proceeds.

The Respondent bears the onus of proving that the claim had prescribed and at the very least, the Respondent had to establish from when the Applicant had a complete cause of action, from when prescription would have started running and the actual date on which the pension proceeds were paid out. This was not clearly established by the Defendant.

There is very little on record to justify a conclusion that had she

exercised reasonable care she could have acquired knowledge of the payout.

In the circumstances the appeal is upheld with costs.
The decision of the Court *a quo* is substituted with the following;

The application for absolution from the instance is refused,

The matter is referred to the Court *a quo* for the proceedings to be continued to completion.

K PILLAY J

I agree

SISHI J

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