Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 13776/2012

MARIA SUSANNA ELIZABETH HERBST APPLICANT

v

SANLAM LIFE INSURANCE LIMITED FIRST RESPONDENT

HANELIE HERBST (ON BEHALF OF SEAN HERBST) SECOND RESPONDENT

Court: Justice J Cloete

Heard: 10 March 2014

Delivered: 12 March 2014

JUDGMENT

CLOETE J:

[1] The applicant by way of amended relief seeks a declaratory order that she is entitled to 50% of the proceeds of a certain living annuity which had its origin in the erstwhile joint estate of herself and the late Willem Jacobus Herbst (*'the*

deceased'), which joint estate was terminated by divorce on 20 November 1998. Coupled to this relief are prayers that the first respondent (and to the extent necessary, the second respondent) pay to the applicant 50% of the proceeds of such living annuity. The second respondent is the guardian of Sean Herbst, the sole beneficiary of the living annuity and the deceased's grandson, who was nominated as such by the deceased after the divorce but prior to his death. During the course of argument it emerged that the amended Notice of Motion has not been served upon the second respondent. The applicant thus only persists with the relief sought against the first respondent at this stage.

[2] The applicant and the deceased were married to each other in community of property on 9 October 1970. During the subsistence of the marriage the deceased became a member of the Central Retirement Annuity Fund (*'the Fund'*). In order to entrench its obligations to the deceased, the Fund took out Sanlam Policy No. 7462821X5 (*'the retirement annuity'*). The retirement annuity commenced on 1 August 1983.

[3] The applicant and the deceased were divorced on 20 November 1998. On the date of divorce the applicant was the sole beneficiary nominated to receive the death benefits under the retirement annuity.

[4] The settlement agreement incorporated in the order of divorce provides that:

> *'Die partye plaas op rekord dat die Verweerder die eienaar is van 'n sekere Sanlam Annuiteit en Uitkeur Polis* [sic] *waarvan die Eiseres huidiglik die*

> *begunstigde is. Die partye kom ooreen om elkeen R100.00 (EEN HONDERD RAND) per maand by te dra as premie tot gemelde polis en dat hulle in gelyke dele geregtig sal wees op die opbrengste en voordele van gemelde polis. Die partye kom ooreen dat hierdie Skikkingsakte en Egskeidingsbevel na uitreiking daarvan by Sanlam opgeteken sal word om die partye se onderskeie belange in die polis te registreer.'*

[5] After the divorce was granted neither the applicant nor the deceased made any further contributions to the retirement annuity. On 1 August 2007 it matured. The deceased was at that time still alive. On 8 November 2007 the first respondent (*'Sanlam'*) calculated the amount to which the applicant was entitled as being R71 293.43 and paid this amount to her on 7 May 2008.

[6] Sanlam also paid an amount of R218 032.21 to the deceased on 7 May 2008. The balance remaining in the retirement annuity of R436 065 (which represented two-thirds of the total amount thereof) was used by the deceased to purchase a living annuity under Glacier Plan No 2385391 (*'the living annuity'*) on 16 May 2008, and he lived off the income therefrom until his death. Although a separate legal entity which should have been joined in these proceedings, Glacier has informed Sanlam that it does not require to be joined.

[7] On 7 August 2008 the applicant's then attorney addressed a letter to Sanlam disputing that the amount of R71 293.43 received by her represented the amount to which she was entitled in terms of the settlement agreement. It was alleged that the applicant was entitled to 50% of the proceeds and benefits of the retirement annuity as set out in the settlement agreement, which in turn had been

made an order of court. It was alleged that Sanlam was bound by the relevant provisions of the settlement agreement, although it had not been joined as a party to the divorce proceedings, nor had it been furnished with any prior notice of the terms of the settlement agreement. Demand was made for payment of the balance "due" to the applicant at that stage. It is common cause that Sanlam failed to comply with the demand contained in the aforementioned letter. The applicant admits that the aforementioned letter was sent to Sanlam and that no further steps were taken by her against Sanlam thereafter until some 3 ½ years later on 17 May 2012.

[8] The deceased passed away on 6 May 2012, with the consequence that the living annuity devolved upon his appointed beneficiary (Sean Herbst).

[9] On 17 May 2012 the applicant, through her current attorney of record, made demand upon Sanlam to cease any further payments from the living annuity until finalisation of these proceedings. When Sanlam failed to comply, the applicant launched urgent proceedings in this court and obtained an interdict preventing payment (to which Sanlam ultimately consented without admission of liability) pending the outcome of this application. Sanlam opposes the relief sought and at this stage it is unclear whether the second respondent will do so, although the indications are that she will.

[10] In essence, the applicant's case is that Sanlam was bound to give effect to the terms of the agreement reached between herself and the deceased as contained in their settlement agreement. On the other hand, it is Sanlam's case that it was

only obliged to endorse the retirement annuity in accordance with the relevant statutory provisions relating to a spouse's interest in a pension fund for purposes of the Divorce Act, 70 of 1979 (*'the Divorce Act'*) as read with the Pension Funds Act, 24 of 1956 (*'the Pension Funds Act'*). It is also Sanlam's case that, whilst the applicant may have a claim against the deceased's estate or the second respondent, she has no claim against Sanlam.

[11] S 37A(1) of the Pension Funds Act provides as follows:

> ***37A. Pension benefits not reducible, transferable or executable.****—(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependents of the member or beneficiary or to a guardian or trustee for the benefit of such dependent or dependents during such period as it may determine.'*

[12] S 7(7)(a) of the Divorce Act stipulates that the *'pension interest'* of a party to a divorce action shall be deemed to be part of his or her assets, subject to certain exceptions which are not relevant here. S 7(8)(a) stipulates that, notwithstanding the provisions of any other law or the rules of any pension fund, a court granting a decree of divorce in respect of a member of such fund may make an order that any part of the *pension interest* of that member which by virtue of s7(7) is due or assigned to the other party to the divorce action concerned, shall be paid by the fund to that other party when any pension benefits accrue in respect of that member.

[13] When the applicant and the deceased divorced in 1998, s 7(8)(ii) of the Divorce Act stipulated that the obligation on a pension fund was to:

> '[Make] *an endorsement… in the records of that fund that that part of the pension interest concerned is so payable to that other party.'*

[14] '[P]*ension fund'* and *'pension interest'* are in turn defined in s 1(1) of the Divorce Act as follows:

> ***"pension fund"*** *means a pension fund as defined in section 1 (1) of the Pension Funds Act, 1956 (Act No. 24 of 1956), irrespective of whether the provisions of that Act apply to the pension fund or not;*
> *[Definition of "pension fund" added by s. 1 of Act No. 7 of 1989.]*
>
> ***"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 as such a member 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;

(b) *is a member of a retirement annuity fund which was* bona fide *established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with the total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act'.*

[15] Accordingly a *'pension interest'* has a specific meaning for purposes of divorce proceedings, and there is a statutory method of calculating the value of the *'pension interest'* of a member of a retirement annuity, namely the total amount of the contributions to the fund up to the date of divorce plus annual simple interest thereon. It is not in dispute that this was how Sanlam calculated the amount due to the applicant of R71 293.47, being 50% of the value of the deceased's pension interest at date of divorce. Any amount not yet accrued to the deceased as at date of divorce did not constitute a patrimonial benefit to which the applicant might have been entitled upon divorce: see *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA) at para [19]; *Eskom Pension and Provident Fund v Krugel and Another* 2012 (6) SA 143 (SCA) at para [11].

[16] In the *Krugel* case at para [8] the court held that: *'a pension fund's right to make deductions from a pension benefit is highly circumscribed and may be exercised*

only as expressly provided by section 37D and section 37A…' of the Pension Funds Act.

[17] The clause in the settlement agreement relied upon by the applicant is thus in conflict with the aforementioned provisions. The provisions in fact prevent Sanlam from giving effect to the parties' intention as expressed therein.

[18] The deceased was therefore unable, as he purported, to bind Sanlam to transfer his right to 50% of the future benefits under the retirement annuity to the applicant in terms of the settlement agreement, whether or not he intended in good faith to do so; and irrespective of whether he intentionally waived his right to rely on those statutory provisions. The applicant, who had no entitlement to the future benefits under the Divorce Act, was similarly unable to do so.

[19] Sanlam was obliged to act in the manner in which it did. In addition, and as already mentioned, Sanlam was not a party to the divorce proceedings which culminated in the settlement agreement being made an order of court. That portion of the court order which fell foul of the statutory provisions is a nullity insofar as Sanlam is concerned. Sanlam was thus entitled to disregard it without having to take steps to have it set aside: see *Swemmer* at para [24].

[20] Sanlam also contends that any claim that the applicant might have against it has in any event prescribed in terms of s 11(d) as read with s 12(1) and (3) of the Prescription Act 68 of 1969. It is submitted that more than three years have

elapsed since, on her own version, the applicant's erstwhile attorney despatched the initial letter of demand to Sanlam on 7 August 2008.

[21] Clearly the applicant was aware, by that date, both of the identity of the "debtor" and of the facts from which the "debt" arose. This notwithstanding, she failed to take any further steps against Sanlam until 17 May 2012.

[22] During argument the applicant's counsel sought to distinguish between the earlier claim contained in the letter of 7 August 2008, namely that based on what the applicant contended was due to her under the retirement annuity at that stage, and the applicant's "new" claim to 50% of the proceeds of the living annuity which, it was submitted, only arose on the date of the deceased's death, being 6 May 2012. She sought to draw this distinction after conceding that, but for the latter claim, all other claims have by now prescribed.

[23] This distinction is artificial. That portion of the retirement annuity that the deceased transferred to the living annuity accrued to him on 16 May 2008. This much is clear when regard is had to the fact that, on the applicant's own version, the living annuity commenced on 16 May 2008 and the deceased received the benefit thereof by way of monthly income from 19 May 2008 until his death.

[24] It accordingly follows that the applicant's claim against Sanlam, to the extent that it might exist, has nonetheless prescribed.

[25] Given that Sanlam has been successful in its opposition to the relief sought, there is no reason why costs should not follow the result. There are three costs orders which are standing over for determination. The first relates to the urgent application launched by the applicant at the outset of these proceedings. The applicant's counsel submitted that, because Sanlam failed to furnish the undertaking demanded, and only consented to the interim relief after the application was launched, Sanlam should bear the costs thereof. I disagree. Sanlam was clearly entitled, not only to oppose the main relief subsequently sought, but also to decline to accede to the applicant's demand because of the direct and substantial interest of the second respondent.

[26] Insofar as the second and third reserved costs orders are concerned, in the first instance, the applicant's legal representatives failed to follow the provisions of practice note 37(19) to compel the filing of Sanlam's answering affidavit. Instead the applicant, despite having been informed thereof, insisted on the premature set down of the matter, causing Sanlam to deliver a notice in terms of rule 30 which resulted in the matter being postponed. In the second instance, the matter was again not properly enrolled through the registrar and the court file was also not placed in order by the applicant's legal representatives. It is thus appropriate that the applicant should be ordered to bear these costs as well.

[27] **In the result the following orders are made:**

1. **The application against the first respondent is dismissed with costs, such costs to include the costs incurred by the first respondent in**

respect of the urgent application launched on 18 July 2012 and the postponements of the main application on 7 November 2012 and 13 November 2013.

2. The relief sought against the second respondent is postponed *sine die.*

J I CLOETE