IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: A69/2023
Reportable: NO
Of Interest to other Judges: NO
Circulate to Magistrates: NO

In the matter between:

M[…] W[…] H[…]	**Appellant**
and	
N[…] E[…] H[…]	**First Respondent**
SHERIFF WEST: BLOEMFONTEIN	**Second Respondent**

CORAM:	MBHELE, AJP et MTHIMUNYE, AJ
HEARD ON:	23 OCTOBER 2023
DELIVERED ON:	09 JANUARY 2024
JUDGMENT BY:	MTHIMUNYE, AJ

[1] This is an appeal against the whole judgement of the Regional Court Magistrate of Bloemfontein handed down on 14 April 2023. In the assailed judgement, the learned Magistrate dismissed the appellant's application to set aside a warrant of execution that was issued in favour of the first respondent against the appellant, as well as staying any execution in pursuance of the aforementioned

warrant pending the final adjudication of this matter. The appellant further sought an order authorising the appellant to approach the Regional Court on the same papers for an order compelling the first respondent to transfer her one half undivided share in a certain immovable property.

[2] The appellant and the first respondent were married to each other in community of property. Upon divorce, they entered into a settlement agreement which was made an order of court. In terms of the settlement agreement, the appellant was to pay the first respondent an amount of R1 400 000.00 (One Million Four Hundred Thousand Rand) from the appellant's Investment Retirement Plan and a retirement annuity ("the policies") held at Discovery and PPS respectively. The settlement agreement further provided that the first respondent would continue to reside in the matrimonial home in Langenhoven Park until she has received the monies referred to above, and to, within 30 days from the final payment, vacate the property.

[3] The first respondent received four payments as follows: a cash payment of R458 699.10 directly from the appellant; R124 394.94 from Discovery, R122 497.68 from PPS and R504 385.42 from PPS. In the remittances from Discovery and PPS, these amounts are depicted as nett payments after PAYE Tax was paid over to the South African Revenue Service (SARS). The total deductions amounted to R190 022.86. This constitutes a shortfall on the amount of R1 400 000.00 which is the subject of this dispute. After receiving the last payment, the first respondent vacated the matrimonial home. To recover

the shortfall of R190 022.86, she caused a Writ of Execution ("a writ") to be issued against the appellant.

[4] The appellant approached the court *a quo* to rescind and set aside the writ on the basis that he had fully complied with the settlement agreement as the shortfall was paid to the South African Revenue Service (SARS) on the basis that the benefit became taxable in the first respondent's hands; and that by vacating the marital home, the first respondent tacitly waived her right to the shortfall. The learned Magistrate disagreed and dismissed the application with costs on the basis that the appellant's policies do not constitute a pension fund; that the first respondent is not a member of PPS and Discovery and could not be expected to be liable for the tax thereof, and had that been the intention of the parties, the settlement agreement would have expressly stated the same; and that it cannot be said that the first respondent had waived her right to the outstanding amount when she vacated her matrimonial home. It is this dismissal that is the subject of this appeal.

[5] At the hearing of the appeal, the appellant did not pursue the contention of waiver on the basis of vacation of the property by the first respondent. This judgment therefore will make no reference thereto but only focus on whether the appellant's policies amount to a pension fund and whether they are therefore taxable in the first respondent's hands and if so, whether or not the appellant had fully complied with the terms of the settlement agreement as he contends.

[6] The appellant argued that the provisions of the settlement agreement transferred the appellant's interests in the policies to the first respondent hence she became liable for the tax thereof. He contends that the policies (IRP and the Annuity) constitute a pension fund and thus the first respondent is liable for tax payable in respect thereof in accordance with the provisions of Section 37D(i)(d)(i) of the Pension Fund Act 24 of 1956 as amended, which provides for a Fund's right to deduct:

> "*from a member's benefit or minimum individual reserve, as the case may be, any amount assigned from his or her pension interest to a non-member spouse in terms of a decree granted under Section 7(8)(a) of the Divorce Act…or in terms of any order made by a Court in respect of the division of assets of a marriage…"*

[7] In contention, the first respondent argues that the settlement agreement made no provisions for the transfer of the appellant's interest to the first respondent in the said policies and as such she should have been paid R1400 000.00 free of any deductions. She says in terms of the settlement agreement; the method of payment was the proceeds of the policies plus an additional payment of the balance to be made by the appellant.

[8] She further argues that the policies do not constitute a pension fund and that it was never the agreement between the parties that the payment in the amount of R1 400 000.00 was a payment as contemplated in the provisions of section 7(8)(a) of the Divorce Act or section 37D of the Pension Fund Act. As such, it was never agreed that the first respondent would be liable for payment of any

tax in respect of the policies and therefore any tax arising therefrom should be paid by the appellant as he is the member of the pension fund whilst the respondent is not.

[9] The relevant provisions of the settlement agreement read as follows:

"…

3.2. The Defendant will reside free of rent or any other expense in the communal home situated at 3[…] E[…] M[…] Street, Langenhovenpark, Bloemfontein until the amount of R1 400 000.00, as referred to in paragraph 4 hereunder is received. The Defendant will vacate the property within thirty (30) days after the payment is received.

…

4.1. The Plaintiff will pay the Defendant the amount of R1 400 000.00 in full and final settlement of the Defendant's claim in respect of the estate in community or property. The amount of R1 400 000.00 will be paid as follows:

4.1.1. 100% of the Plaintiff's total value in the Discovery Invest Retirement Plan (Policy number: 857[…]) as on 1 July 2021.

4.1.2. 98% of the Plaintiff's market value in the PPS annuities (Policy Number: POL 2011[…] and 2010[…]) as on 1 July 2021, and

4.1.3. The remaining outstanding amount within sixty (60) days after the last payment received from either of the Policies referred to in paragraphs 4.1.1 and 4.1.2.

…

6.

6.1. The Plaintiff is a member of the Discovery Invest Retirement Plan, with Membership number 8570014656 held with Discovery.

6.2. The parties agreed that the Defendant shall be entitled to 100% of the Plaintiff's pension interest in the Fund as on 1 July 2021, as defined in Section 1 of the Divorce Act, 70/1979, as

on date of divorce in terms of the provisions of Section 7(7) and (7) (8) (a) of the Divorce Act, 70 of 1979, read with the provisions of Section 37(D)(4) of the Pension Funds Act, 24 of 1956.

6.3. *The parties further agree that the 100% of the abovementioned fund interest, as on 1 July 2021, which is payable to the Defendant by Discovery will be paid directly to the Defendant in the alternative will be transferred to an approved Fund in accordance with Section 37(D)(4) of the Pension Act of 1956, as amended.*

6.4. *Accordingly, it is ordered that an endorsement be made in the records of Discovery that 100% of the abovementioned fund interest is awarded to the Defendant.*

7

7.1. *The Plaintiff is a member of the Personal Pension Retirement Annuity Fund with Membership number POL2010[…];*

7.2. *The parties agreed that the Defendant shall be entitled to 98% of the Plaintiff's pension interest in the Fund as on 1 July 2021, as defined in section 1 of the Divorce Act, 70/1979, as on date of divorce in terms of the provisions of Section 7(7) and (7)(8)(a) of the Divorce Act, 70 of 1979, read together with the provisions of Section 37 (D) (4) of the Pension Funds Act, 24 of 1956*

7.3. *The parties further agreed that the 98% of the above mentioned fund interest, as on 1 July 2021 which is payable to the Defendant by the Fund will be paid directly to the Defendant in the alternative will be transferred to an approved Fund in accordance with Section 37(D)(4) of the Pension Act of 1956, as amended.*

7.4. *Accordingly, it is ordered that an endorsement be made in the records of the Fund that 98% of the abovementioned fund interest is awarded to the Defendant.*

8.

8.1. *The Plaintiff is a member of the Personal Pension Retirement Annuity Fund with Membership number POL2011[…];*

8.2. *The parties agreed that the Defendant shall be entitled to 98% of the Plaintiff's pension interest in the Fund as on 1 July 2021, as defined in section 1 of the Divorce Act, 70/1979, as on date of divorce in terms of the provisions of Section 7(7) and (7)(8)(a) of the Divorce Act,*

70 of 1979, read together with the provisions of Section 37 (D) (4) of the Pension Funds Act, 24 of 1956.

8.3. The parties further agreed that the 98% of the above mentioned fund interest, as on 1 July 2021 which is payable to the Defendant by the Fund will be paid directly to the Defendant in the alternative will be transferred to an approved Fund in accordance with Section 37(D)(4) of the Pension Act of 1956, as amended.

8.4. Accordingly, it is ordered that an endorsement be made in the records of the Fund that 98% of the abovementioned fund interest is awarded to the Defendant.… "

[10] I now turn to deal with the first respondent's contention that the applicant's policies do not constitute a pension fund. The Divorce Act defines pension fund as *'pension fund as defined in section 1(1) of the Pension Funds Act 24 of 1956, irrespective of whether the provisions of that Act apply to the pension fund or not'* The Pension Funds Act 24 of 1956 ("PFA") defines a pension fund as a '*pension fund organisation'* and further defines a pension fund organisation as "*any association of persons engaged in any occupation established with the object of providing benefits for members or former members of such an association upon their retirement from such occupation, or for the dependants of such members or former members upon the death of such members or former members".*

[11] In **Nailana v Nailana (Case No 714/2018 [2019] ZASCA 185**) delivered on 03 December 2019, at Paragraphs 23 – 25 the Supreme Court of Appeal clarified this interpretation in light of the provisions of the Divorce Act as follows:

"*[23] As correctly pointed out by A B Downie Essentials of Retirement Fund Management, (2019) para C2 at 12: "It is important to note that the difference between pension and provident funds do not stem from the Pension Funds Act which does not distinguish between the two types of fund. The Pension Fund Act treats both pension and provident funds the same under the description of a "pension fund organization" covered earlier in this chapter. The difference between pension funds and provident funds mentioned in this chapter, stem from the Income Tax Act."*

…

[25] It is therefore clear that the reference to a 'pension funds' in the Divorce Act, means a 'pension fund organisation' in the PFA, which in turn includes both pension and provident funds…"

[12] Looking at the above dictum, it is clear that retirement annuities fall within the definition of pension funds. The Discovery Investment Retirement Plan is self-explanatory and there can be no confusion of whether or not it is a pension fund. The PPS Annuity and Personal Pension Retirement Annuity Funds from PPS are annuities falling within the Pension Funds Act's definition of pension fund. It follows therefore that the first respondent's contention in this regard ought to be rejected.

[13] The next contention by the first respondent is that the settlement agreement made no provision for the transfer of the member's interest from the appellant to her. Clause 4.1 of the settlement agreement as cited in para [9] above provides for the payment of the R1400 000.00 by the appellant to the first respondent as well as the policies from which such money must be paid and the balance.

[14] Clauses 6.1, 7.1 and 8.1 stipulates or confirms the appellants' membership of the Discovery Investment Retirement Plan and the two Personal Pension Retirement Annuity Funds with PPS respectively. Clauses 6.2, 7.2 and 8.2, save for the distinctive names of the policies and percentages (100% for the IRP and 98% for the Annuity Funds) contains the same provision in respect of the three policies which reads as follows:

> *"The parties agreed that the Defendant shall be entitled to 100% of the Plaintiff's pension interest in the Fund as on 1 July 2021, as defined in Section 1 of the Divorce Act, 70/1979, as on date of divorce in terms of the provisions of Section 7(7) and (7) (8) (a) of the Divorce Act, 70 of 1979, read with the provisions of Section 37(D)(4) of the Pension Funds Act, 24 of 1956."*

[15] Clauses 6.4,7.4 and 8.4 respectively ceded the appellant's interests in the polices by providing that:

"Accordingly, it is ordered that an endorsement be made in the records of Discovery (or the Fund respectively) that 100% (or 98% respectively) of the abovementioned fund interest <u>*is awarded*</u> (my emphasis) *to the defendant".*

Through these clauses, the appellant clearly transferred his int1erests in the policies to the first respondent. The argument that the settlement agreement made no provision for the transfer of interests to the first respondent cannot be true and has to fail.

[16] Further, in the letter from PPS dated 06 August 2021, the first respondent was given a choice between taking the money as a cash withdrawal, which would be subject to tax or using it to purchase a retirement annuity from an insurer of her choice, she chose the former. For purposes of completeness, the relevant provisions of the letter read as follows:

> "*The options available to you are as follows:*
>
> 1. *Cash*
>
>   *You may take the full amount of the benefit as a cash lump sum. The lumpsum will the subject to tax by SARS. If tax is payable, it will be deducted from the benefit and paid to SARS before making payment to you.*
>
> 2. *Retirement Annuity:*
>
>   *You may use the full amount of the benefit to purchase a Retirement Annuity policy from a long-term insurer of your choice.*

[17] In my view, it follows therefore that if the interests in the policies were transferred to the first respondent, such would be taxable in the hands of the first respondent. for this reason, this court is persuaded that the appellant had fully complied with the terms of the settlement agreement. Resultantly, the appellant's appeal must succeed.

[18] I now deal with the issue of costs, both in respect of the costs of the application in the court *a quo* and this appeal. In his notice of motion to the court *a quo*, the appellant asked for costs against the 1st respondent on the

scale as between attorney and client on the basis that she is deliberately delaying the finalisation of this matter in order to frustrate and prejudice the appellant. Costs are governed by two principles, first that unless expressly otherwise enacted, the granting thereof rests within the discretion of the court, which discretion must be exercised judiciously; and secondly that generally, costs follow the result i.e. they are awarded in favour of the successful litigant. An attorney and client scale is a punitive scale reserved for matters where there has been conduct on the part of a litigant that the court views so serious that it warrants a punitive scale. The first respondent raised bona fide and legitimate issues in opposition of the appellant's application. It was necessary for the parties to get a clear interpretation and understanding of the implications of the relevant clauses of their deed of settlement. It was therefore not unreasonable for the first respondent to pursue and oppose the matter in a manner that she did. In my view, it would be just and fair that each party is ordered to pay their own costs, which costs are to include the costs of litigation in the court *a quo* and the costs of this appeal.

Consequently, I make the following **Order**:

1. The appeal against the order of the court *a quo* is upheld.
2. Each party to pay his / her own costs of appeal.
3. The judgement of the court *a quo* is set aside and replaced with the following order:

"1. *The warrant of execution issued on 16 February 2022 in favour of the first respondent is set aside.*

2. *The Applicant is authorised to approach this honourable court on the same papers, duly amplified if needs be, for an order compelling the 1st Respondent to:*

    2.1. *transfer / endorse her half undivided share in the immovable property situated at 1[…] M[… Road, Rocklands, Bloemfontein into the name of the Applicant;*

    2.2. *sign all documents necessary to transfer / endorse her half undivided share in the immovable property into the name of the Applicant.*

3. *Each party to pay his / her own costs"*

D.P. MTHIMUNYE, AJ

I concur:

M. MBHELE, AJP

Appearances:

For the Appellant	:	Adv N Plaatjies
		Bloemfontein Society of Advocates
Instructed by		Mlozana Attorneys
		Bloemfontein

For the First Respondent	:	Adv M C Louw
		Bloemfontein Society of Advocates
Instructed by		Honey Attorneys
		Bloemfontein