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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 17228/00

2004-04-01

DELETED BY [] AND IS NOT APPLICABLE	
(1) REPEATEDLY	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
DATE <u>14/5/2004</u>	SIGNATURE 

In the matter between

ELSIE MARIA MAGDALENA JACOBS

Plaintiff

and

L SCOTT

Defendant

J U D G M E N T

WILLIS, J: This is an action to enforce specific performance of certain proprietary obligations that were agreed to between the parties in an agreement of settlement that was made an order of court at the time when they were divorced on 6 August 1993.

The parties have spent several days this week negotiating with one another in good faith through their attorneys and their respective actuaries. I have been informed from the Bar that all matters have been settled save for one outstanding matter, the interpretation of clause 2.13 of the agreement that was entered into between them on

19 May 1993, in other words several months before they were actually divorced.

The relevant clause reads as follows:

"The plaintiff shall be the exclusive owner of the insurances policies referred to in Annexure C attached hereto. The plaintiff shall be liable for payment of all premiums in respect of such policies. The defendant warrants that the policies reflected in Annexure C are all current, have not been paid up, have not lapsed and have not been surrendered or borrowed against. The defendant indemnifies the plaintiff against any harm, damage or loss arising out of a breach of this warrant."

Annexure C contains a schedule of five Momentum Life insurance policies and one Old Mutual policy. In the schedule are the policy numbers, the present paid up value, the monthly premium and the maturity date. Issues in respect of all the policies, save two, have been resolved between the parties. The two policies in respect of which there is not resolution between the parties, are Momentum Life policy number UL6968275 and Momentum life policy number UL5301916. Alongside those two policies in the schedule are recorded their present paid up values. In respect of UL6968275 the paid up value is recorded as R22 831. In respect of UL5301916 the paid up value is recorded as R34 073.

The plaintiff contends that what was warranted was the existence of the policies, that they were all current, that they have not been paid up, have not lapsed, have not been surrendered or borrowed against. The defendant contends that what was warranted

was the present paid up value. That, in essence, is the dispute which remains outstanding between the parties. I have now been asked to give a ruling in this matter in order to assist the parties in drawing up the final agreement between them, to resolve the issues in the action subsequent to their divorce. After I have given this ruling, I have been made to understand that they will prepare a formal document which they will ask me to make an order of court.

I have also been asked to give a ruling relating to the costs of this second action that was instituted after the decree of divorce had been issued.

A few points need to be noted. Firstly, the present paid up values recorded in the schedule, Annexure C, would be notional values and not real values. That much is obvious in any schedule of insurance policies that have a maturity date at some future time. In respect of both these policies a maturity date is 2003. Furthermore, given the fact that the agreement was entered into on 19 May 1993 but the divorce was only granted on 6 August 1993, and that it is common cause between the parties, quite obviously that the effective date of the performance was the date of divorce, the present values recorded in Annexure C could quite obviously not have been the values as at the effective date. But more profoundly, it seems to me that a plain reading of clause 2.13 is that what is warranted is precisely as was contended by Mr Daniels, namely that the policies are all current; that they have not been paid up; that they have not lapsed; that they have not been surrendered and that they have not been borrowed against.

The present values of the policies were not warranted. Had the parties intended so to do it would have been a simple matter to have recorded as much in the agreement. Annexure C to the agreement, in my view, merely contains a description of the policies rather than contain any warranty of fact.

In so far as costs are concerned, I believe that both parties should be rewarded for the fact that they have endeavoured, at least through their representatives and their experts, to settle this matter in good faith and I do not see why any party should be penalised for costs save that quite obviously the costs of today when this matter has been argued should be awarded in favour of the successful party.

The following ruling is therefore made:

1. The plaintiff is entitled to the full value of the two Momentum Life policies having numbers UL6968275 and UL5301916 as at the date of 6 August 1993, calculated on the basis that the policies had remained in tact and that premiums have been paid from inception to date of divorce and, accordingly, the policies had a value as at the date of divorce of R41 445 and R145 364.
2. The defendant is to pay the plaintiff's costs of today in this action.