IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***19th October 2020*** Signature: _____

APPEAL CASE NO: A3035/2020

COURT *A QUO* CASE NO: RC/912/2017

DATE: 19th OCTOBER 2020

In the matter between:

R, I Appellant

and

R, D Respondent

Coram: Adams J *et* Majavu AJ

Heard: 14 October 2020

Delivered: 19 October 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 19 October 2020

Summary: Marriage – Divorce – marriage out of Community of Property subject to the accrual system –

Contract – settlement agreement in divorce action – interpretation of contract – whether husband can recover from wife tax payable on payment by husband's pension fund to the wife of her half share of the accrual – the applicability of section 7(7) and (8) of the Divorce Act and section 37D(1)(d) of the Pension Funds Act – an agreement must be read in its context and regard must be had to the purpose for which it was concluded – the point of departure is the language.

ORDER

On appeal from: The Gauteng Regional Court, Vereeniging (Regional Magistrate S P Morwane sitting as Court of first instance):

(1) The appeal is upheld with costs.

(2) The order of the Vereeniging Regional Court is set aside and in its place the following order is substituted:

'a) The applicant's application for the setting aside of the warrant of execution against his property is dismissed with costs.

b) The applicant shall pay the respondent's costs of the application.'

(3) The respondent shall pay the appellant's costs of this appeal.

JUDGMENT

Adams J (Majavu AJ concurring):

[1]. The issue in this appeal concerns the proper interpretation of a clause contained in a settlement agreement concluded between the appellant (the wife) and the respondent (the husband), which was incorporated into the divorce order granted in the Vereeniging Regional Court ('the trial court') on the 31st of July 2018.

The question to be answered is what the legal effect is of the terms of the said clause which relates to the redistribution of the accrual of the respective estates of the parties.

[2]. The English translation of the clause reads as follows:

'3.1 The [appellant] is entitled to payment of the amount of R2 527 995, being 50% of the amount of the difference between the accrual of the [respondent's] estate and that of the appellant'.

[3]. This clause should be read together with the following clauses in the settlement agreement, which was in fact the second agreement of settlement concluded between the parties:

'4.2 The administrator of the [respondent's] Provident Fund shall deduct the amount of R2 527 995 from the member's benefit in terms of Section 7(8)(a)(i) of the Divorce Act read with Section 37(D)(1)(d)(i) of the Pension Funds Act.

4.3 The [appellant] prefers that the aforementioned amount be paid out to her directly into a bank account to be nominated by her.

4.4 The administrator of the [respondent's] Pension Fund shall endorse their register and records accordingly.

4.5 The [appellant] shall ensure that payment of the said amount is effected within sixty days from the date of the divorce.'

[4]. The appellant and the respondent were previously married to each out of community of property in terms of an antenuptial contract subject to the accrual system. On the 31st of July 2018 the marriage was dissolved by a decree of divorce of the Vereeniging Regional Court incorporating an agreement of settlement concluded between the parties on the day of the divorce. The important part of the agreement of settlement was clause 3.1 cited in para 2 supra, which provided that the respondent was entitled to an amount of R2 527 995, which represented her half of the difference between the accrual of the respective estates of the parties. In terms of the settlement agreement, the aforementioned sum of R2 527 995 was payable by the respondent to the appellant within sixty days from the date of the divorce order.

[5]. The original clause in Afrikaans reads as follows:

‘3.1 Die verweerderes is geregtig op betaling van die bedrag van R2 527 995 synde 50% van die bedrag waarmee die eiser se boedel meer aangewas het as haar boedel.’

[6]. Undoubtedly this provision in the settlement agreement was based on and was in terms of the provisions of s 3(1) of the Matrimonial Property Act, Act 88 of 1984 (‘the MPA’) and implies: (a) that the appellant’s estate showed a smaller accrual than the estate of the respondent; and (b) that the difference between the accrual of the respective estates of the spouses was an amount of R5 055 990. I gathered that this amount represented in the main the value of all of the assets in the estate of the respondent, which consisted of a house, his benefit interest in his pension fund and other property. The aforegoing is common cause between the parties, although the exact details of the values of the individual assets were not apparent from the papers before us. It bears emphasising that, contrary to what the respondent contends, the amount of R2 527 995 did not represent 50% of his pension benefit – certainly not on the evidence before the trial court.

[7]. All the same, in my judgment this agreement had the effect that the respondent would pay to the appellant, who would receive from the respondent *in lieu* of half of his assets, an amount of R2 527 995. This is apparent from the wording of the clause and there can and should be no debate about that. This is also how the parties understood the agreement and to give effect to their accord the respondent was going to raise the funds to pay off his admitted debt to the appellant. The evidence was that he would endeavour to raise a loan for that amount against his pension fund as he did not have access to that type of cash and he was reluctant to sell his house, which he wanted to retain for himself. Importantly, in this agreement it was clearly not contemplated by the parties that the appellant would receive a portion or a percentage of the respondent’s ‘pension interest’ in his pension fund – that was to remain intact for the benefit of the respondent.

[8]. So far so good and if the respondent had obtained a loan there would have been no issues – the appellant would have received her R2 527 995, probably as a capital payment. There would have been no tax implications for either the appellant or the respondent, and if there were, each party would have

had to deal with that on his or her own. However, as luck would have it, the respondent's application for a loan against his pension fund was unsuccessful and another plan had to be hatched as the appellant by then was insisting on payment in terms of the settlement agreement and the court order.

[9]. During September 2018, the respondent, through his attorneys, proposed that the settlement agreement be amended so as to enable him to access his pension fund and to pay the appellant directly from his pension interest the amount of R2 527 995. This could only be done by bringing the agreement within the ambit of s 7(7) and (8) of the Divorce Act, Act 70 of 1979 ('the Divorce Act'), read with s 37D(1)(d) of the Pension Funds Act, Act 24 of 1956 ('the PFA'). This resulted in the amended agreement of settlement, signed by the parties on the 13th of October 2018, and which was made an order of Court of the 25th of October 2018 by the Vereeniging Regional Court. This is the agreement which is the subject of the dispute between the parties in this appeal. The only difference between the initial agreement and the amended agreement was the incorporation of clause 4 referred to at para 3 above. Significantly, clause 3.1 of the agreement was retained. This means that in the end the express agreement between the parties was that the appellant was entitled to R2 527 995, 'synde' half of the difference between the difference between the accrual of the estates of the parties.

[10]. I indicated above that my interpretation of this clause is that the respondent should pay to the appellant R2 527 995 *in lieu* of her fifty percent share in the increased value of the estate of the respondent. The question is whether the new clause 4 (cited in para 3 supra) makes a difference to this interpretation of the agreement.

[11]. That question arises in the following context. After the amended agreement of settlement was made an order of court on the 25th of October 2018 the respondent's Pension Fund processed the appellant's claim and on the 26th of November 2018 paid to the appellant an amount of R1 770 916.80, which was arrived at by deducting R757 078.20 for tax payable on the 'withdrawal', treated as income in the hands of the appellant. Predictably, the

appellant was aggrieved by this deduction and proceeded to issue a warrant of execution against the respondent's property for payment of the said sum of R757 078.20. The respondent in response to the warrant applied to the Vereeniging Regional Court to set aside the writ, arguing that he had complied with his obligations in terms of the court order of the 25th of October 2018 and the agreement of settlement underpinning that order.

[12]. The respondent submitted in the court *a quo*, as he does in this court, that the amount stated in clause 3.1 of the settlement agreement constitutes fifty percent of the respondent's pension interest in his provident fund. The value of the respondent's pension interest, so the respondent further submitted, constituted the value by which his estate exceeded the value of the appellant's estate. The difficulty with this contention by the respondent is that there is no evidence before us in support of same. Even more telling is the fact that this contention flies in the face of the express wording of the clause, which is to the effect that the said sum represented her share of the difference between the accrual of their estates – in this clause 3.1 nothing is said about the pension interest of the respondent.

[13]. The respondent also refers to correspondence between the parties which preceded the conclusion of the amended settlement agreement. I am not sure that such evidence is admissible. It may well be that reference to the said correspondence, which relates to the negotiations leading up to the conclusion of the amended settlement agreement, offend against the parole evidence rule.

[14]. But even if I accept that the evidence is admissible on the basis that it gives context to the conclusion of the agreement and assist in understanding the purpose at which the conclusion of the agreement was aimed, it mitigates against the case of the respondent. The simple fact of the matter is that it is clear from those exchanges between the parties that they had diagonally opposed views as to who of them would be liable for any tax deductions. So much so that the appellant during the discussions had proposed that a clause be incorporated in the amended agreement of settlement to the effect that the respondent would make good any shortfall in the payment as a result of tax

deductions. Therefore, as I said, the correspondence between the parties prior to the conclusion of the amended agreement is of little assistance in the interpretation of the said agreement.

[15]. The trial court ruled in favour of the respondent. It held in essence that the appellant is liable for the payment of the tax deducted from the amount due to her on the basis that the provisions of s 37D(1)(d) of the Pension Funds Act is applicable. The learned Regional Magistrate concluded as follows:

'(20). In the present matter, not only did the [appellant] agree to be paid her share in terms of the provisions of the Divorce Act and the Pension Funds Act that triggered the issue of tax liability and deductions to be made. She set in motion the provisions of Section 37D(4)(b)(1) of the Pension Funds Act that permits the [appellant] to make an election on how her share of the pension interest should be paid out and thus accelerating the said payment with its tax deduction, which was correctly done separately on the amount to be paid.

(21). The [appellant's] claim of her accrual share in the [respondent's] estate, by virtue of the second settlement agreement falls squarely within the ambit of Section 7(7) and 7(8) of the Divorce Act 70 of 1979. A further reading of the second settlement agreement directs the reader to read same with the provisions Section 37D(1)(d)(i) of the Pension Funds Act 24 of 1956. On what basis would the [respondent's] Provident Fund not deduct the tax from the [appellant's] claim, when the Court Order so directs.

(22). This Court was not called upon to interpret the Court order as it stands, against the intention of the parties. The reasons why the [appellant] opted to sign the second settlement agreement as it stands is unknown.'

[16]. The trial court accordingly granted an order setting aside the warrant of execution against the property of the respondent and ordered the appellant to pay the respondent's costs of the application to set aside the writ. It is against that judgment and order that the appellant appeals to this court.

Discussion

[17]. It is trite law that the provisions of an agreement must be read and understood in the context within, and having regard to the purpose for which, the agreement was concluded. The point of departure is the language employed in the document. But the words must not be considered in isolation. A restrictive

examination of words, without regard to the context or factual matrix, has to be avoided. Evidence of prior negotiations is inadmissible, but evidence relating to the surrounding circumstances and the meaning to be given to special words and phrases used by the parties, is admissible. No distinction is drawn between context and background circumstances. Words have to be interpreted sensibly so as to avoid unbusinesslike results.

[18]. *In casu*, the wording of the clause is crystal clear – the appellant is entitled to payment of the sum of R2 527 995, which represents her half share of the difference between the accrual of the estates of the parties. What is also clear is that there is no provision in the agreement that any amounts should be deducted from this sum. Therefore, if the language employed in the agreement is the starting point, then there can be no doubt that pursuant to the amended agreement of settlement the appellant should have received R2 527 995.

[19]. Clause 4 does not alter this position. We know for a fact that clause 4.1, which makes reference to s 7(8)(a)(i) of the Divorce Act and s 37(D)(1)(d)(i) of the Pension Funds Act, was inserted into the amended agreement for one purpose and for one purpose only, that is to assist the respondent and to enable him to comply with his obligation to pay to the appellant her half share of the difference between the accrual in their estates. It was in that context that the amended agreement, incorporating clause 4, was drafted and concluded The only way in which the respondent was able to withdraw the amount from his pension fund was to word the amended settlement agreement, in particular clause 4, in the manner it was worded – with specific reference to s 7(8)(a)(i) of the Divorce Act and s 37(D)(1)(d)(i) of the Pension Funds Act. The intention was never to award to the appellant a percentage of the respondent's pension interest as contemplated in s 7 of the Divorce Act. The truth is that the amount was withdrawn from the respondent's pension fund at his instance and on his behalf – he needed the money in order to discharge his obligation to the appellant in terms of the agreement. It is therefore the respondent, and not the appellant, who received payment from his pension fund and he is liable for the tax.

[20]. This, as indicated, is the context in which the amended agreement was concluded, which lends itself to an interpretation which accords with the express wording of clause 3 that the appellant, when all was said and done should have received R2 527 995 and that the respondent was liable to her for payment of that amount.

[21]. Moreover, the intention was never to have assigned to the appellant from the respondent's pension benefit the amount of R2 527 995 or any amount for that matter, despite the fact that the parties were aware that one of the assets which formed part of the respondent's estate was his pension interest in the Pension Fund. If that was the intention of the parties, the agreement surely would have provided thus and not that the appellant is entitled to a specified sum.

[22]. In sum, on a proper interpretation of the amended settlement agreement reached between the parties it has to be accepted that the appellant should have received from the respondent R2 527 995. The learned Magistrate misdirected herself in that regard. As I have already indicated, such an interpretation is consistent with the express wording of clause 3 and with the amended agreement as a whole read in context, and having regard to the purpose for which it was concluded.

[23]. For all the reasons set out above, it has been shown that the trial court erred in finding that the respondent is not liable to refund to the appellant the amount of R757 078.20. Therefore, the appeal must succeed.

[24]. In the circumstances, I am of the view that the appeal against the order of the Regional Court should be upheld.

Order

In the result, the following order is made:-

(1) The appeal is upheld with costs.

(2) The order of the Vereeniging Regional Court is set aside and in its place the following order is substituted:

‘a) The applicant’s application for the setting aside of the warrant of execution against his property is dismissed with costs.

c) The applicant shall pay the respondent’s costs of the application.’

(3) The respondent shall pay the appellant’s costs of this appeal.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

I agree

Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	14th October 2020
JUDGMENT DATE:	19th October 2020
FOR THE APPELLANT:	Adv K Meyer
INSTRUCTED BY:	Esthé Muller Incorporated, Vereeniging
FOR THE RESPONDENT:	Adv P G Leeuwner
INSTRUCTED BY:	William S Grant Attorneys, Vereeniging