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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPORTABLE

CASE NO: 50730/2007

DATE: 08/02/2011

In the matter between:

N L R

Applicant

and

E, R

First Respondent

SASOL PENSION FUND

Second Respondent

JUDGMENT

MOKGOATLHENG J

(1) The applicant seeks an order against the first respondent for the payment of the amount of R135 614.27, in respect of the tax deducted from his pension interest in the second respondent and paid to the Receiver of Revenue, consequent upon the first respondent's invocation of section 37 D (d) (1) of the Pensions Fund Act 24 of 1956.

THE FACTUAL MATRIX

(2) The applicant and first respondent's marriage was dissolved on the 25 August 2006. In terms of section 7 (8) (a) of the Divorce Act 70 of 1979 the court made an order encapsulating clause 5 of the parties settlement agreement devolving their patrimonial benefits, which provided: "the first respondent shall be entitled to 30% of the applicant's interest held with and accruing from his membership with the second respondent, calculated as from the date of divorce."

(3) Section 7 (8) (a) of the Divorce Act 70 of 1979 provides:

"(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question shall forthwith notify the fund concerned that an endorsement be made in the records of that fund that part of the pension interest concerned is so payable to that other party;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge; hypothecation or attachment of the pension benefits, or any right in respect thereof in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned

(4) At the dissolution of the marriage, section 37 D (1) of the Pension Funds Act 24 of 1956 which governed the assignment of a non-member spouse's interest in a pension interest of a

member spouse, provided:

(1) A registered fund may-

(d) deduct from a member's benefit or minimum individual reserve, as the case may be -

37A Pension benefits not reducible, transferable or executable

"(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 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 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 dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine

(i) any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7 (8) (a) of Divorce Act, 1979 (No 70 of 1979);....."; and

In terms of section 37 A (11) thereof, any portion of the pension fund interest a non-member spouse was entitled to pursuant to such decree of divorce, only accrued to such non-member

spouse upon the resignation, retirement or death of the member spouse.

(5) Section 37 A (1) of the Pension Fund Act 24 of 1956 provides as follows:

"Save to the extent permitted by this Act, the income Tax, 1962 Act 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 determination of a judgment debtors financial position in terms of section 65 of the Magistrates' Court (Act 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 to a guardian or trustee for the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine."

(6) In terms of section 37 A (1) of the Pension Funds Act 24 of 1956 the

first respondent had to wait until the applicant's pension was paid out to the applicant as a lump sum before her assigned 30% interest in the applicant's pension fund became due and payable to her.

(7) The lump sum paid to the applicant attracted a tax liability in his possession and such tax liability was exclusively to his account. It was only after the applicant's lump sum pension payment was taxed, that the first respondent's assigned 30% interest in the applicant's pension, accrued and became due and payable to the first respondent by the second respondent.

(8) The tax liability accrued to the applicant's account because section 2 of the Second Schedule of the Income Tax Act, No. 58 of 1962 provided:

"subject to the provisions of section 9 (1) (g) and paragraph 2 A, 2 B

and 2 C, the amount to be included in the gross income of any person in terms of paragraph (e) of the definition of "gross income" in section 1 shall be -

(b) any amount received by or accrued to that person by way of a lump sum benefit derived in consequence of or following upon -

(i) his or her retirement or death, or

(ii) the termination of his or her employment due to -

(AA) his or her employer having ceased to carry on or intending to cease carrying on the trade in respect of which he or she was employed; or.....

(iA) assigned in terms of a divorce order under section 7 and (8) (a) of the Divorce Act 1979

(Act No. 70 of 1979) to the extent that the amount so assigned is deducted from the minimum individual reserve of that person's former spouse in terms of section 37 D

(1) (d) (i) of the Pension Funds Act, 1956 (Act No. 24 of 1956), or is so deducted in terms of section 37 D (1) (d) (ii) of that Act as a result of the deduction contemplated in section 37 D

(1) (d) (i) of that Act;

less any deduction permitted under paragraph 6

(2) An amount contemplated in subparagraph (1) (b) shall be deemed to accrue to a person -

(a) in the case of an amount contemplated in subparagraph (1) (b) m on the date on which an election is made as contemplated in section 37 D (4) (b) (ii) of the Pension Funds Act, 1956 (Act No. 24 of 1956), or on the date on which the amount is paid in terms of section 37 D (4) (b) (is/) of that Act and

(b) in the case of an amount contemplated in subparagraph (1) (b) (iB), on the date of its transfer."

(9) Section 2 (C) of the Second Schedule of the Income Tax Act No 58 of 1962 provides:

"subject to the provisions of Section 9 (1) (G) and paragraphs 2 (A), 2 (B). "For the purposes of paragraphs 2 and 2 (A)" " When a court has made an order that any part of the pension interest of a member of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund shall be paid to the former spouse of that member, as provided for in the Divorce Act 70 of 1979"

(10) In terms of this section, part of the pension interest or amount is not deemed to have been received by, or to have accrued to a person other than a member. In terms of the said section 2 (B), it is deemed to be an amount that accrues to the pension fund member on the date on which the pension interest, (of which that amount forms part), accrues to that pension member. It consequently follows, that the tax liability is a debt incurred by and for the account of the applicant

payable by him to the Receiver of Revenue, in terms of section 2 of the Second Schedule of the Income Tax Act No 58 of 1962.

(11) From the 1 March 2009, in terms of the amendment to section 37 (D) 4 (b) (1) of the Pension Funds Act No 24 of 1956 a non - member spouse (the first respondent) became

entitled to exercise an election for the payment of the 30% interest assigned to her in terms of section 7 (8) (a) of the Divorce Act 70 of 1979 in the applicant's pension interest in the second respondent at any time before the applicant's resignation, retirement or death. Pursuant to the amendment of section 37(D) 4 (b) (1) of the Pension Fund Act 24 of 1956 a non-member spouse (the first respondent) from the 1 March 2009 became entitled to exercise an election for the payment of the 30% interest assigned to her in terms of section 7(8) (a) of the Divorce Act 70 of 1979 in the applicant's pension interest in the second respondent at any time before the applicant's resignation, retirement or death.

(12) In April 2009 the first respondent duly exercised her right, and elected to withdraw the 30% interest assigned to her from the applicant's pension interest in the second respondent by invoking section 37 (D)

(b) (1) of the Pension Funds Act No 24 1956. On the 17 April 2009, the administrator of the second respondent, Alexander Forbes, paid the first respondent an amount of R300 199.99 from the applicant's pension interest in it to the first respondent. This amount was calculated as at the 25 August 2006 as the 30% assigned and accruing to the first respondent from the applicant's pension interest in the second respondent.

(13) On the 19 April 2009, Alexander Forbes, advised the applicant that in terms of a tax directive from the South African Revenue Services the amount of R135 614.27, was determined by the former as the tax payable consequent upon the payment of the first respondent's assigned 30% interest from the applicant's pension resulting in a total deduction of R435 814.26 from the applicant's total pension of R1 000 666.63.

THE APPLICANT'S SUBMISSIONS

(14) The applicant contends that in terms of section 2 B of the Second Schedule of the

Income Tax Act No. 58 of 1962 he is entitled to recover from the first respondent the tax paid consequent upon her invocation of section 37 (D) 4 (b) (11) of the Pension Funds Act No. 24 of 1956, further he contends that pursuant to the dictates of section 2 B of the Second Schedule of the Income Tax Act No. 58 of 1962, such tax payment or liability is not a debt to his account as envisaged in clause 3.2 and 6 of the settlement agreement. The applicant argues the payment of the first respondent's 30% assigned interest in his pension created a tax liability for him by the ex lege operation of the deeming provision in section 2 B of the Second Schedule of the Income Tax Act 58 of 1962.

THE FIRST RESPONDENTS SUBMISSIONS

(15) The first respondent contends that the 30% interest assigned to her in terms of clause 5 of the settlement agreement is the total due and payable to her without deducting tax therefrom, and submits that such tax free payment is congruent with Clause 3,2 of the settlement agreement, because at the execution of the settlement agreement it was within the parties contemplation that in terms of the Income Tax Act 58 of 1962 the applicant was liable to pay tax liability because tax payable by the applicant consequent upon the payment of the first respondent's assigned 30% interest in the applicant's pension interest in the second respondent, is a debt to the account of the applicant in terms of clause 3.2 and 6 of the settlement agreement.

(16) The first respondent contends that, in terms of clause 3.2 and 6 of the settlement agreement the applicant has no right of recovery against her for the amount of R137 614.27 deducted as tax from his pension interest in the second respondent because:

(a) the applicant has no contractual right arising from the terms of the settlement agreement entitling him to any refund of the tax deducted from the applicant's pension interest in the

second respondent;

(b) clause 6 of the settlement agreement provided that as from the 25 August 2006 the parties do not have any further claims against each other, and both unequivocally waived or abandoned any such claims which existed during the subsistence of their marriage;

(c) clause 3.2 of the settlement agreement provided: "the parties agree that each party shall be responsible for the payment of their respective individual accounts owed and in either party's name"; and

(d) it was in the contemplation of the parties that the tax liability triggered by the payment of the first respondent's assigned 30% interest was to accrue to the account of the applicant.

THE ANALYSIS OF EVIDENCE

(17) 'Pension interest' is defined in section 1(1) of the Divorce Act, as follows 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 determined on the date of the divorce on account of his resignation from his office

(18) In the case of *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (C) it was held:

'the necessary implication of the 'deeming provision' in section 7 (8) (a) of the Divorce Act 70 of 1979, read together with the relatively narrow definition of 'pension interest' in section 1 (1), is that any other 'right' or 'interest' which the member spouse may have in respect of pension benefits which have not yet accrued was - at least after 1 August 1989 - not to be regarded as an asset in the estate of such member spouse in determining the patrimonial benefits to which

the parties to the divorce action may be entitled. (Paragraph[19] at384D.)

Once a part of the pension interest of the member spouse became 'due' or 'is assigned' to the non-member spouse in the course of the divorce proceedings, the Court could order that such part of the pension interest had to be paid by the pension fund concerned to the non-member spouse 'when any pension benefits accrue in respect of the member spouse. That portion of the pension interest allocated to the non-member spouse would be payable by the fund concerned only at some future date when the 'pension interest' in question accrue to the member spouse. This date would be determined by the rules of the pension fund governing the relationship between it and the member spouse. Moreover; there was no provision in the relevant sections of the Act for the pension fund concerned to be ordered to pay to the pension interest allocated to that spouse from the date of divorce to the date of eventual payment...the non-member spouse did not become the 'owner' of the policy or of the unaccrued pension benefits, did not replace the member spouse as a member of the fund, and could not therefore exercise any right of the member spouse to anticipate (or postpone) the agreed maturity date of the policy"

(19) The first respondent's submission that even though the applicant contends section 2 B of the Second Schedule to the Income Tax 58 of 1962 enjoins him to recover the tax paid consequent upon the first respondent's election to invoke the said section 37 D (4) b (1) of the Act of 1956, such payment still remains a debt within the ambit of the settlement agreement, and is a debt for the account of the applicant, as it falls squarely within the ambit of clause 3.2 of the settlement agreement has no merit.

(20) When the parties concluded the settlement agreement with reference to the Income Tax Act 58 of 1962 and in accordance therewith, the applicant was clearly responsible for the

payment of his tax because the first respondent's 30% interest in the applicant's pension strictly speaking first accrued to the applicant, and only thereafter accrued to the first respondent upon the payment of her 30% interest in his pension, consequently the tax payable accrued to the applicants account as it was levied on the pension lump sum paid to him.

(20) When the parties entered into the settlement agreement at the time of the divorce, it could never have been in their contemplation that the Pension Funds Act 24 of 1956 be would in future be amended to enable the non member spouse to be entitled to the earlier payment of her 30% assigned interest in the applicant's pension because section 2 B of the Second Schedule to the Income Tax Act 58 of 1962 was extant at the time of the dissolution of the marriage.

TAX PAID BY MEMBERSPOUSE RECOVERABLE

(21) Section 2 B of the Second Schedule provides: "For the purposes of paragraphs 2 and 2A, where a court has made an order that any part of the pension interest of a member of a pension fund, provident fund or retirement annuity fund shall be paid to the former spouse of that member, as provided for in the Divorce Act, 1979 (Act No. 70 of 1979), the amount of that part is deemed to be an amount that accrues to that member on the date on which the pension interest of which that amount forms part, accrues to that member: Provided that so much of any tax payable as is due to the inclusion in the income of such person of any amount in accordance with the provision of this paragraph, may be recovered by such person from the former spouse to whom or in whose favour the part in question is paid or becomes payable."

(22) Pursuant to the dictates of section 37 D (4) (b) (1) Pension Fund Act 24 of 1956 a non - member spouse makes an election to enforce an order made in terms of Section 7 (8) (a) of the Divorce Act 70 of 1979, the assigned 30% interest in the members pension is taxed separately, that is evident and reaffirmed by the last portion of section 2 B which states: "Provided that so much of any tax payable as is due to the inclusion in the income of such person of any amounts in accordance with the provisions of this paragraph, may be recovered by such person from the former spouse to whom, or in whose favour the part in question is paid or become payable."

(23) It is patent that the applicant's right to recover the tax liability paid is not based on contract, it arises ex lege. The reason it arises ex lege is because the non member spouse, the first respondent has made an election and invoked section 37 (4) (b) (1) of the Pension Fund Act 24 of 1956. Once the first respondent has made the election so to speak to accelerate the payment of her assigned 30% interest in applicant's pension, the Second Schedule to the Income Tax Act 58 of 1962 is triggered, the deducted payment of the first respondent's assigned 30% interest attracts a tax liability, and is taxed in the hands of the member spouse who retains a right of recovery to such payment.

(24) The applicability of section 2 (4) of the Second Schedule of the Income Tax Act 24 of 1956 makes the position clear that if the first respondent had bided her time and did not invoke section 37 D 4 (b) (1) of the Pension Fund Act 24 of 1956 the tax liability would have been a debt accruing to the applicant's account as envisaged in terms of the settlement agreement made an order of court on the 25 August 2006 in terms of section 7 (8) (a) of the Divorce Act 70 of 1979.

(25) The moment the first respondent elected to invoke section 37 (D) 4 (b) (1) the tax implications sequelae were triggered and the tax liability incurred to the applicant. Had the first respondent strictly adhered to clause 5 of the settlement agreement, the tax liability would not have arisen, the situation would quite simply have been as it was as at the 25 August 2006, as clearly set out in section 2 (1) of the Second Schedule of the Income Tax Act 58 of 1962 which states: "subject to the provisions of Section 9 (1) (G)". The amount to be included in the gross income of any person for any year of assessment in terms of paragraph E of the definition of gross income in Section 1 shall be – I. The amount awarded to the person in terms of an order of divorce, to the extent that the amount is payable by the pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund."

(26) Clause 5.1 of the settlement agreement has to be read in the context of section 37 D (e) (2) of Pension Funds Act No 24 of 1956, in terms whereof each party is taxed in accordance with the amount of the pension interest each party receives in its hands. The settlement agreement is still extant, the parties may still rely on its terms. The inclusion of clause 5.1 thereof arises out of the Section 7 (8) (a) of the Divorce Act 70 of 1979, which permits such inclusion.

(27) Section 37 D (e) (2) of The Pension Funds Act 24 of 1956 provides:

"(2) For the purposes of paragraph (a) (ii) (bb) and (cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled on termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default

(28) Consequently, the only contemplation that could have been in the parties minds at the time of the execution of the settlement agreement, was that section 37 D (1) of the Pension Funds Act 24 of 1956 would endure and would regulate the payment of the first respondent 30% assigned interest in the applicant's pension. When it did accrue to the first respondent at a future time, the applicant's pension interest in the second respondent would have been taxed in accordance with the Income Tax law applicable on the 25 August 2006.

(29) The manner in which clause 5.1 is concluded attests to this contemplation.

"D/e partye kom ooreen dot die eieseres geregtig sal wees op 30% van die voordete waarop die verweerder geregtig mag wees voortuitspruitend uit sy lidmaatskap van die Sasol Pensionfonds. Die berekening van die eiseres se belong sal gedoen word soos op datum van egskeiding van die partye."

(30) There is absolutely no reference to a tax obligation, arising from or pursuant to the income Tax Act 58 of 1962 which could have been contemplated by the parties regarding any future amendment to the Income Tax Act 58 of 1962 concerning any tax liability besides, the parties being properly mindful of the fact that the first respondent's 30% assigned interest would have been paid out to the member spouse, taxed in his hands and thereafter divided in accordance with clause 5 of the settlement agreement..

(31) Clause 6 of the settlement agreement provides:

"Afgesien van voorafgaande het hierdie partye geen verdere eis het teen mekaar nie", en doen beide partye hiermee onherroeplik afstand van enige eise wat ontstaan het gedurende die huwelik." It is patent that the applicant's entitlement and claim to recover the tax paid as a consequent of the first respondent's invocation of section 37 (D) (4) (b) (1) of the Pension

Fund Act is not a claim that arose during the subsistence of the marriage or at the execution of the settlement agreement. It is patently a claim that has arisen ex lege in terms of section 37 d (4) (b) (1) of the Pension Fund Act after the inception of the amendment of section 2B of the Income Tax Acts of 1962. The settlement agreement does not contain a waiver of the applicant's rights to invoke the provisions of section 2B of the Second Schedule of the Income Tax Act 58 of 1962.

(32) THE ORDER

(a) The first respondent is forthwith ordered to pay to the second respondent the amount of R135 614.27 to be paid to the credit of the applicant's pension interest in the second respondent; and

(b) The first respondent is ordered to pay the applicant's costs.

Dated Johannesburg on the 4th February 2011.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 5 MAY 2010

DATE OF JUDGMENT: 8 FEBRUARY 2011

ON BEHALF OF THE APPLICANT: MR R. GOSLET

INSTRUCTED BY: COUZYN'S INCORPORATED TELEPHONE NUMBER: (011) 788-0188

ON BEHALF OF THE RESPONDENT: MR G.M. YOUNG

INSTRUCTED BY: SMOOK AND LAMPRECHT

TELEPHONE NUMBER: (011) 492-1450