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IN THE HIGH COURT OF SOUTH AFRICA

(SOUTH GAUTENG HIGH COURT, JOHANNESBURG)

CASE NO: 22725/2008

DATE: 2012-11-15

In the matter between

C M M

Applicant

and

P M (nee G)

Respondent

JUDGMENT

WILLIS J:

[1] On 31 August 2010 Tshabalala AJ (as he then was) made the following order:

"1.The marriage (i.e. between the parties) is

dissolved.

2. The two properties specifically excluded by the ante nuptial contract, in favour of both parties, i.e. the property at 233 Kew Township and number 34 Madison Farms East Sandton, remain excluded from the assets of the parties.
3. The fixed property at number 1406 Deneysville, and the plaintiff's shares in Behati Solutions (Pty) Limited are declared the plaintiff's assets and form part of the accrual.
4. The plaintiff is to pay the wasted costs on Friday 27 August 2010 and the costs of the action for 30 and 31 August 2010.
5. No costs order is made for the day of 26 August 2010."

[2] On 1 February 2010 my brother Tsoka J, made an order appointing one Esaias Johannes Janse van Rensburg, as the receiver and liquidator of the parties accrued estate. It is common cause that, owing to squabbles between the parties, he has not yet succeeded in dividing the accrued estate between the parties.

[3] The defendant in the divorce action is now the applicant in the matter before me in which he seeks an order that the order of Tshabalala AJ on 31 August 2010 is varied as follows:

- "1.1 The marriage is dissolved.
- 1.2 The two properties specifically excluded by the ante nuptial contract in favour of the properties i.e. the property 233 Kew Township and number 34 Madison Farms East, Sandton, remain excluded from the assets of the parties.
- 1.33. The fixed property at number 1406 Deneysville and the plaintiff's shares in Kahayalabo Women's Investments (Pty) Limited which company hold 15% on Behati Solutions (Pty) Limited are declare the plaintiff's assets and form part of the accrual.
- 1.4 The plaintiff's pensionable interest in DBSA Provident Fund, administered by Alexander Forbes ('the pension fund'], with membership number M00753488 form part of the accrued estate of the parties and the defendant shall be entitled to any portion as determined by the receiver and liquidator, appointed in terms of the court order dated 1 February 2011 or order of the court. Shall be entitled to any portion as

determined by the receiver and liquidator appointed in terms of the court order dated 1 February 2011, or order of the court.

1.5 The assets of the parties acquired after 3 October 1994 and not specifically excluded by ante nuptial contract form part of the accrued estate between the parties.

1.6 The defendant is entitled to make his election in terms of section 37(d)(1)(3) of the Pension Fund Amendment Act and notify the pension fund of his election in writing within 14 days of the determination (mentioned in 1.4 of above) of the accrued estate between the parties.

1.7 The pension fund is directed to implemented the election opted by the defendant within 60 days of the written notification mentioned in 1.6 above.

1.8 The plaintiff is to pay the wasted costs of Friday 27 August 2010 and the costs of the action for 30 and 31 August 2010.”

1.9 No cost order is made for the day of 26 August 2010.”

[4] A point in *limine* has been taken by the respondent, namely that a proper case has not been made out for the variation of the order. I agree that it is not normally open for this court to vary orders previously made by other colleagues in this division.

[5] The appropriate remedy ordinarily would be, if a judge in this division made an error, to take that judge on appeal or, if there are problems in the interpretation of the order, to take Mr Van Rensburg appointed as receiver and liquidator of the parties on review.

[6] It is, however, common cause having heard argument for the parties, that the plaintiff did not and does not own shares in Behati Solutions (Pty) Limited. Accordingly as it is common cause that this is an error, it is a patent error, it is a common cause error, the words in paragraph 3 of Tshabalala AJ's order, reading "and the plaintiff's shares in Behati Solutions (Pty) Limited are" are deleted and replaced with the word 'is'.

[7] I also, in order to assist Mr Van Rensburg, wish to make it clear that it seems apparent to me that on a plain reading of paragraph 3 it does not mean that there are no other assets of the plaintiff that may form part of the accrual. All that it means is that it is made clear beyond any doubt for the assistance of the parties and presumably any receiver appointed, that the fixed property at number 1406 Deneysville is part of the accrual.

[8] I hope that this minor direction will assist the parties to resolve the matter according to a plain reading of the order of Tshabalala AJ. The remaining relief does not require any order. I shall simply make an order to the effect that no order is made in respect of the remaining relief sought by the applicant. Insofar as costs are concerned, it seems to me appropriate not to penalise either party at this stage.

[9] Certainly, there has been a measure of success on the part of the applicant, in terms of obtaining clarity on the question of the plaintiff's interest in Behati Solutions (Pty) Limited. It seems to me best that the costs of this application are to be calculated as part of the accrual when the receiver and liquidator divides up the estate between the parties.

[10] The following is the order of this court:

ORDER

1. Paragraph 3 of the order of Tshabalala AJ on 31 August 2010 is varied to the extent that the words 'and the plaintiff's shares in Behati Solutions (Pty) Limited are' after the words '1406 Deneyville' are deleted and replaced with the word 'is'.
2. No order is made in respect of the remaining relief sought by the applicant in the notice of motion dated 28 February 2012.
3. The costs of this application are to be costs in the accrual of the estate in respect of which Mr Janse van Rensburg has been appointed receiver and liquidator.

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C M M

Applicant

and

P M

Respondent

CASE NO:

22725/2008

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