REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 17992/2011

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

....
DATE SIGNATURE

In the matter between:

G E F **Applicant**

and

A F **Respondent**

JUDGMENT

VICTOR, J:

[1] This is an application for summary judgement in the sum of R182 422,29 plus interest and costs on the attorney and client scale. Before dealing with the merits of the application, something needs to be said about the manner and the procedure which preceded the final hearing of this matter.

[2] On Tuesday and certainly by the time the file was sent to my chambers, the defendant's opposing affidavit was not in the file. On Tuesday, Mr Welz mentioned that there was an affidavit by the defendant but that it had not been properly served and filed. There was no answering affidavit in the court file. I raised with him whether this would not result in further unnecessary procedural steps to recall the matter or rescind the judgment. At the time of hearing the matter at the unopposed roll there was no appearance noted by the respondent and after hearing full argument, I granted the order.

[3] At the end of the roll for the day Counsel appeared and requested that the matter be recalled by reason of the fact that the matter was opposed and that he had been instructed the opposing affidavit should be in the court file.

[4] The defendant sought condonation for the fact that the answering affidavit was not received by me. However, the application for condonation lacked detail. This aspect was relevant to the question of costs.

[5] The facts for the condonation are as follows: The correspondent attorney on behalf of the plaintiff, Mr Shull filed an affidavit to explain the situation. This became necessary because Mr Felgate on behalf of the defendant wished to argue the summary judgment matter and I required an explanation as to what had happened.

[5] According to Mr Shull, on 1 July 2011, at 08h47 he received the affidavit resisting summary judgment. On the same day, at 12h04 he sent a letter by fax to the defendant's attorneys, acknowledging receipt of the affidavit and advising that the application for summary judgment would proceed. He also sent a copy of that fax to the attorney who had instructed him as correspondent, Mr Dracatos.

[6] The letters are very clear. The letter to the defendant's attorney notes that the summary judgment would be proceeding on the Tuesday of the motion court

week. A request was made as to the name of the defendant's advocate and the defendant's attorney and at the same time he advised that the plaintiff's advocate would be Mr Welz.

[7] Quite clearly from the facsimile report, this letter must have been received by the defendant's attorney. In response an affidavit was filed by the respondent's attorney employed in the firm Breytenbach, Mostert and Skosana.

[8] In this affidavit, the allegation is made that the answering affidavit was filed at the plaintiff's attorney's correspondent timeously before 12h00, but did not get to court in time, because the court closed between 13h00 and 14h00. I have perused the affidavit as well as that of Mr Giyane who was the messenger, who claims to have served the affidavit before 12:00, on 1 July 2011 and it is unclear from his affidavit, whether he indeed filed the affidavit at all, after two o'clock. It certainly was not brought to my chambers.

[9] I make the observation that the defendant's attorney has dealt with this matter in a most cavalier manner. The matter was dealt with in the ordinary unopposed roll. It also necessitated Mr Shull coming to court on Wednesday because the court requested that someone from the plaintiff's attorney's offices attend court, so that the procedural aspects of this matter could be explained. After considering the matter I directed the matter be heard on the Thursday.

[10] Counsel who moved the application attended court on the Thursday. The applicant opposed the recalling of the matter but I allowed rehearing because of the importance of the matter to the parties.

[11] I took into account the cavalier manner in which the defendant's attorney had dealt with this matter. But at the end of the day, I found that it was in the interests of justice for the matter to be fully argued. An appropriate costs order was appropriate as a result of the procedural non compliance made by the defendant's attorney, whether it was wilful or not but it certainly was handled in a negligent manner.

. The parties were previously married. The marriage was dissolved by a decree of divorce. There was a settlement agreement and in clause 8.5 of the settlement agreement, the following was agreed to between the parties:

> "The plaintiff shall be entitled to an amount equal to half of the value payable of the defendant's pension fund, as at date of granting of a decree of divorce in this matter. Should the plaintiff wish to receive payment of the amount to which she becomes entitled, at the date of granting the decree of divorce, the defendant undertakes to sign all documents and to do all things necessary within seven days of being called upon to do so, for the pension fund to effect payment to the plaintiff, the pension fund shall make payment to the plaintiff as is set out in the Pension Funds Amendment Act."

[13] The plaintiff duly complied with his obligations and made all the necessary arrangements with the pension fund. Central to this issue is the fact that the agreement is silent as to who should pay tax on pension amount.

[14] After the divorce, the Old Mutual, the administrator of the pension fund, made a payment to the defendant in an amount equal to half of the plaintiff's individual reserve held by the fund, as at date of divorce and such payment amounted to R640 078,23. However, subsequent to the payment and prior to February 2009, the Old Mutual deducted a further amount of R255 136,06 from the applicant's minimum reserve held by it. This amount was R182 422,29 being the tax payable on the share of the pension as well as a further amount of R72 713,77 being the vat payable.

[15] The plaintiff's particulars of claim deal fully with the manner in which the different sections of the Divorce Act apply as well as Schedule 2 of the Revenue Laws Amendment Act. Quite clearly Section 1 of the Divorce Act 70 of 1979 defines a pension interest in relation to a divorce action. The definition of a pension interest in Section 1 of the Divorce Act has to be read to include the after tax withdrawal benefit as defined in the fund's rules. Section 7 of the Divorce Act contains further provisions relating to the pension interest in a divorce, including Section 7(8) of the Divorce Act which is designed to ensure an equitable distribution and an equitable division of the assets on divorce.

[16] In terms of Section 37(d)(1)(a) of the Pension Funds Act 24 of 1956, the deduction from a member's minimum individual reserve of any amount assigned to such individual, can be paid out as well as the tax required to be deducted or withheld in terms of the fourth schedule of the Income Tax Act, thus justifying the Old Mutual deducting the said amount from whatever was left in reserve even after payment had been effected.

[17] Quite clearly, the defendant in this matter was the beneficiary of the lump sum payment and therefore was only entitled to that lump sum benefit after the necessary tax deduction had been made. In terms of clause 2(b)(1) of the second schedule to the Income Tax Act the tax component has to be deducted prior to the pension interest accruing in the hands of the beneficiary.

[18] Prior to 1 March 2009, the following reference is made and definition was made in respect of gross income. Gross income is the aggregate of the amounts deducted from the minimum individual reserve of a person during that year, in terms of section 37(d)(1)(d) of the Pension Funds Act 24 of 1956 which aggregate amount must be deemed to be a retirement fund lump sum withdraw benefit received by or accrued to the person on the date of the deduction.

[19] Section 1 goes on to provide specifically as follows:

> "Provided that so much of any tax payable as is due to the inclusion in the income of such person of any amount contemplated in this paragraph pursuant to any order contemplated in section (7) of the Divorce Act

> made to the extent that the tax is attributable to an amount contemplated in the said section of the Pension Funds Act, be recovered by such person from the person to whom and in whose favour the amount is paid or payable."

[20] Quite clearly therefore the defendant was only entitled to the pension interest after the relevant tax was deducted. It is the defendant's case and described by Mr Welz as being a curious set of defences, set out in a very brief affidavit that the plaintiff in its particulars of claim failed to indicate what additional tax he had to pay as a result of the amount that was paid to the defendant included in his gross income.

[21] Mr Felgate very properly abandoned the other defences which were set out in the summary judgment application that included a defence in terms of the National Credit Act 34 of 2005 and various other curious defences.

[22] It was submitted on behalf of the defendant therefore said that the amount claimed and referred to in paragraph 11 of the particulars of claim, did not take into account a proper calculation of what the tax should have been. In other words, the plaintiff had other income and this affected the gross income component which the defendant should not have been prejudiced by. Therefore the amount claimed by the plaintiff, is not an amount capable of being the subject matter of summary judgment proceedings.

[22] Rule 32(1)(b) of the Uniform Rules of Court, deal with what constitutes a liquidated amount in money and as submitted by Mr Welz, if the amount is capable of ascertainment or can be readily ascertained then the claim is capable of the grant of summary judgment.

[23] In determining whether the claim is to be considered 'a liquidated amount in money' within the meaning of Rule 32 (1) (b) the principle is clear. In *Fatti's Engineering Co (Pty) Ltd v Vendick Spares (Pty) Ltd* 1962 (1) SA 736 (T) the decision as to whether a debt is capable of speedy ascertainment is a matter on which the judge exercises a discretion. Precise rules therefore are impossible of formulaic precision. In my view the amount was capable of speedy and prompt ascertainment and it was therefore a liquidated amount. In this case, the Old Mutual had formulated the amount and this demonstrated that the amount was capable of speedy ascertainment. The plaintiff did not have to attend to calculations.

[24] In addition in paragraph 11 of the particulars of claim, the calculation as to how the amounts are arrived at, show and demonstrate that the amount was capable of ascertainment very easily. There can be no dispute that the amount claimed was indeed the amount deducted.

[25] Mr Felgate relied on item 2(1)(b)(1) of the Income Tax Act:

> "So much of any tax payable as is due to the inclusion in the income of such person, of any amount

> contemplated in this paragraph. It was submitted on behalf of the defendant that upon a proper construction of the words as is due to the inclusion in the income of such person, clearly limits the amount recoverable from the defendant by the plaintiff to the amount which the plaintiff's tax liability had been increased due to the deemed inclusion of the amount so deducted."

[26] Reliance was placed on the case of *Bern NO v Commissioner for Inland Revenue and Another* 1999(3) SA 876D, 881H-882A. Although this dealt with an amount which accrued and in relation to disposition of a pension benefit, upon the death of the member Mr Felgate submitted that it was appropriate to deal with this case in that manner. It was the defendant's case that no allegation had been made by the plaintiff as to the amount by which his tax liability has been increased, due to the deemed inclusion of the amount allegedly deducted from the plaintiff's minimum reserve. It was contended that in the absence of a more detailed calculation and taking into account the plaintiff's total tax liability, the amount of such additional taxation is in dispute and therefore not capable of the grant of summary judgment.

[27] According to the defendant, the plaintiff should have made a full disclosure of his financial position during that tax year and how his other income affected that deduction by Old Mutual. Whilst there might be merit in the submission by the defendant in relation to the disposition of a pension benefit upon the death of the member, this matter is one which involves a divorce.

[28] The divorce agreement, although it does not deal with the tax component of the pension benefit, was settled quite clearly in a manner which specifically omitted to deal and the parties agreed not to deal with the tax implications. The parties, however, anticipated that some statutory interpretation would be required, as the final sentence in that clause refers to the following: "*The Pension Fund shall make payment to the plaintiff as is set out in the Pension Funds Amendment Act."* My emphasis.

[29] Quite clearly the parties were aware that there would be some statutory implication, whether it be in terms of the Pension Funds Act or and then of course any other statute which would have a direct impact on that. If it was the defendant's intention that she would not be liable for any taxation on her benefit, that provision should have been included in the settlement agreement.

[30] Absent reference to any tax implications, the defendant has to accept the imposition of the taxation on the lump sum payment made to her. In addition, the submission made by the defendant that the entire tax profile of the plaintiff should have been pleaded.

[31] The parties must have anticipated that there would be a tax implication. Their failure to deal with such a tax implication in the agreement expressly means that the settlement which was agreed to between the parties

must be construed strictly and there is no room for debate or further determination as to how the taxation on that lump sum payment should be made.

[32] In the result I find that the defendant's defence to this claim fails.

[33] On the question of the costs, the defendant albeit through her attorneys resulted in unnecessary costs being incurred by the plaintiff. Costs on the unopposed scale were incurred on Tuesday, 5 July 2011. Costs on the unopposed scale were also incurred on 6 July 2007.

[33] I therefore order that in the light of the defendant's attorney's attitude, the cavalier manner in which he has dealt with this matter, that a costs order on the attorney and client scale for those two hearings must be made.

[34] As regards the hearing when the actual opposed matter was heard, that must be on the party and party scale.

The order that I make is that:

1. Summary judgment is granted in terms of the draft which I mark "X" and which is dated 8 July 2011 as amended by me, as follows:

1.1. Prayer 1 stands.

1.2. Prayer 2 stands.

1.3. Prayer 3: The defendant is to pay the costs of the appearances on 5 and 6 July 2011 on the unopposed scale on the attorney client scale.

2. The defendant is to pay the costs of suit

_____

VICTOR J