



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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

CASE NO: 31663/2015

In the matter between:

MAKAZIWE TSHAMELA (NEE MBANGATA)

Applicant

and

JACOB NDUMISO TSHAMELA

First Respondent

STELLA OWETHUS TSHAMELA

Second Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Third Respondent

JUDGMENT

MIA, AJ:

[1] The applicant seeks among other relief foremost the following orders:

1. that the first respondent repay an amount of R244 886,58 to the applicant, as part of the monies that accrued to him from his pension fund pay-out on 22 September 2015 in the amount of R489 773,16.
2. in order to give effect to the order in paragraph 1 above, that the property situated at Erf [...], Welgedacht which is registered in the name of the

second respondent is to be sold within 30 days of the granting of this order;

3. the first respondent to be solely responsible for the costs of the sale of the property associated with the above sale;
4. the proceeds of the above sale in paragraph 1 or 2 above shall be deposited into the applicant's attorneys trust account which details are as follows:

BANK:	FIRST NATIONAL BANK
ACCOUNT NUMBER:	[...]
BRANCH CODE:	250655
REFERENCE:	Mr H Bezuidenhout/Tshamela

5. In the event that the property sold for less than R244 886, 58 that the first respondent will be responsible for the shortfall;

The balance of the relief related to securing the co-operation of the first and second respondent in relation to the above relief sought. The relief herein is opposed by the first respondent only. There is not opposition by the second or third respondent herein.

[2] The applicant and respondent are married in community of property since 15 October 2009. The parties are the joint owners of the matrimonial home situated at [...] N Street, Paynville, Springs ('the matrimonial home'). The applicant issued summons on 7 September 2015 wherein she requested division of the joint estate which included the assets built up during the parties union including the matrimonial home situated in Paynville, Springs.

[3] The respondent vacated the marital home during September 2015. The applicant became concerned when the respondent was seen during working

hours in the area and requested information in this regard. The enquiries yielded the information that the first respondent elected to apply for a voluntary early retirement package. He was offered an amount of R489 773,16 as a total package in settlement of his claim against the pension fund. An amount of R84 649, 38 was paid as tax and a further amount of R102 058, 37 was paid to Standard Bank into the bond. An amount of R303 065, 41 was available and transferred to a Capitec bank account.

[4] The first respondent opened a First National Bank account on 9 March 2015 as is evident from the bank statement attached to the founding affidavit.¹ The first respondent transferred an amount of R290 000, 00 on 22 September 2015 from the Capitec bank account into the First National bank account.² On 28 September 2015 the first respondent withdrew R270 000, 00 of the initial amount deposited. The applicant states that the first respondent purchased a property in the name of the second respondent who is his niece. She is a student with no access to funds and no ascertainable resources to purchase the property according to the applicant. The property is situated at Erf [...], Welgedacht. The applicant is of the view the first respondent's actions constitute a dissipation of the pension fund monies and the property was registered in the name of the first respondent's niece to deprive the applicant of her half share of the money paid out by the pension fund.

[5] The first respondent opposed the application on the basis that the applicant is not entitled to half of his pension pay-out and that she is only entitled to half of the pension which accrued from the date of their marriage. He further opposed the application on the basis that he utilised the pension money paid to him to pay school fees in the amount of R14 700,00; to purchase clothing for the children in the amount of R12 000,00 and to effect renovations to the matrimonial home in the amount of R50 000,00. No receipts were attached to the first respondent's opposing affidavit to support the statement that he made

¹ Founding Affidavit, Annexure, Bank statement, p59

² Founding Affidavit, Annexure, Bank statement, p59

the aforementioned payments. In her replying affidavit, the applicant denied that the payments were made.

[6] The pension fund monies were paid into the first respondent's Capitec account as is evident from the Telkom Retirement Fund correspondence and statement³ attached to the applicant's founding affidavit. The first respondent opened a First National bank account and transferred a portion of the money namely R290 000, 00 into this account and withdrew R270 000, 00 seven days later. This is not disputed by the first respondent. The first respondent does not explain what happens to this R270 000,00 other than to state that certain expenses were paid for without furnishing receipts as proof of these payments. This is denied by the applicant. The expenses referred to by the first respondent amount to approximately R77 000, 00 of the R290 000, 00. He does not account for the balance of the money which is approximately R213 000, 00.

[7] Section 15(3) of the Matrimonial Property Act 88 of 1984 provides:

'A spouse shall not without consent of the other spouse-

(a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;

(b) receive any money due or accruing to the other spouse or the joint estate by way of-

(i) **remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;**

(ii)

(iii) ...'(my emphasis)

³ Founding Affidavit, Annexure, p53 and 54

- [8] Mr Pool, counsel for the applicant, submitted that the first respondent's opposing affidavit constituted a bare denial. He does not explain where he received the amount of R290 000, 00 from. He makes allegations that he improved the property which he does not reside in and which he states he was forced to vacate due to discord between the applicant and himself and which property he gives the impression he was forced to vacate due to the discord. If the money was not pension money he does not state whether it was an inheritance or any other source which could be excluded from the joint estate.
- [9] Mr Pool submitted that the second respondent has remained silent throughout and has not explained where the money came from for the purchase of the property. The withdrawal of the amount of R270 000, 00 from the first respondent's account on 28 September 2015 and the purchase of the property shortly thereafter leads to the only reasonable conclusion that the second respondent's source of income is the first respondent. In the event that a dispute of fact is anticipated he referred this Court to the decision in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008(3) SA 371(SCA) at para 13 where Heher J stated at paragraph [13]:

'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of

a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed on a legal adviser who settles an answering affidavit to ascertain and engage with the facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.'

[10] Mr Pool submits that the first respondent has not seriously and without ambiguity raised a dispute of fact. He submitted that this was an instance where this Court could refer to the decision in *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T), at pp 1163-5 to find that the denial by the respondent of the facts alleged by the applicant did not raise a real, genuine and *bona fide* dispute of fact (see also *Da Mata v Otto*, NO, 1972 (3) SA 585 (A)) as the pension pay-out was without the knowledge of the applicant paid into his Capitec bank account. He transferred the money into the First National bank account which he opened in September and withdrew the funds knowing that a portion thereof accrued to the applicant. He submitted that this Court ought to consider the matter having regard to the applicant's version and the first respondent's version ought not to be accepted.

[11] Mr Leso appearing on behalf of the first respondent submitted that the applicant had calculated the amount incorrectly in that she failed to consider that from the amount of R489 773,16 reflected as a total package in settlement of his claim against the pension fund, the amount of R84 649,38 was paid as tax and a further amount of R102 058, 37 was paid to Standard Bank into the bond. The first respondent only received an amount of R303 065,41. He submitted further that the applicant was in any event only entitled to half of the first respondent's pension which accrued from the date of the

marriage being 15 October 2009 to the date of dissolution. He was not able to refer to any authority to support this submission.

[12] Mr Leso submitted further that the first respondent utilised the pension monies to purchase clothing for the children in the amount of R12000. Further he paid school fees in the amount of R14, 700. He also renovated the matrimonial home with he invested R50 000. The pension fund money was used for this purpose. The first applicant was aware of these expenses and did not protest when it was spent in this manner. It was thus used with her consent and knowledge. Mr Leso submitted further that the first applicant was only entitled to half of R303 065,41 and after the above amounts were deducted which were utilised with her knowledge. He conceded that the first respondent did not attach receipts supporting the payments he had referred to and which are denied by the applicant.

[13] There is no response from the second respondent regarding the source of the R270 000. The second respondent is silent. She is a student. There is no form of income. It is unlikely that she would have access to this amount readily. The purchase of the property occurs around the same time that the first respondent receives his pension pay-out and withdraws an amount of R270 000 from his First National Bank account. The first respondent is unable and has not accounted for the R270 000 withdrawn from his account. The conclusion is reasonable and inescapable that he paid for the property and registered the property in the name of the second respondent. This is further understandable in view of the acrimony and breakdown in the parties' relationship. The first respondent states in his opposing affidavit that the applicant is not entitled to all of his pension monies. It follows thus that the registration in the second respondent's name, appears to be a ploy on his part to withhold part of the pension monies paid to him from the applicant.

[14] The first respondent has failed to provide receipts to support his statement that he made certain payments to reduce the liabilities of their joint estate using the monies received from the pension fund. His denial of the facts averred by the applicant does not raise a genuine dispute of fact. He has failed to address the issues raised by furnishing the appropriate responses such as the receipts for the expenses he refers to. The applicant in any event denies that these payments were made. The first respondent fails to explain how he dealt with the amount of R270 000. This information lies purely within his knowledge. Much of his case rests on a bare denial and the second respondent's silence. In these circumstances, I cannot find that the test is satisfied as he has failed to grapple with the averments made by the applicant.

[15] The applicant is entitled to half of the money received from the pension fund. The first respondent has received same and he has not explained satisfactorily how he has dealt with the money. In view hereof the applicant has made out a case for the relief sought.

ORDER

[16] In the result I make the following order:

1. The first respondent is ordered to pay the amount of R151 532.70 to the applicant as her part of the pension monies having accrued to him from his pension fund pay-out in the amount of R489 773.16, on 22 September 2015.
2. Failing payment of the amount in paragraph 1 above within a period of 3 months from the date of this order, the property situated at Erf [...], Welgedacht, which is presently registered in the name of the second respondent (the property), is to be sold, in respect of which:

2.1 The first respondent shall be solely responsible for the cost of the sale of the property associated with the above sale;

2.2 The proceeds of the sale shall be deposited into the applicant's attorneys trust account which details are as follows:

BANK: FIRST NATIONAL BANK

ACCOUNT NUMBER: [...]

BRANCH CODE: 250655

REFERENCE: Mr H Bezuidenhout/Tshamela

2.3 In the event of the net proceeds derived from the sale of the property being less than the amount of R151 532.70, the first respondent shall be liable for payment of the shortfall to the applicant;

2.4 The first and second respondents shall do all such things and sign all such documents as may be required to ensure the sale of the property and to give effect to the transfer pursuant to such sale, failing which the sheriff is authorised and directed to sign any documents to effect the sale of the property and to register the transfer of the said property.

3. The first respondent is interdicted and restrained from further encumbering the joint estate in any manner whatsoever.
4. The third respondent is directed to endorse the title deed of the property to the effect that the property shall not be encumbered and/or alienated and/or transferred prior to the dissolution of the marriage between the

parties alternatively before the first respondent has paid to the applicant the amount of R151 532.70, without the applicant or the applicant's attorney's prior written consent thereto having been obtained.

5. The first respondent shall pay the applicant's costs of this application.

S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv D Pool
Instructed by	:	Heine Bezuidenhout Inc
On behalf of the respondent	:	Adv SM Leso
Instructed by	:	LB Maruwa Attorneys
Date of hearing	:	30 October 2017
Date of judgment	:	8 November 2017

