**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 42704/2016

1. Reportable: ~~Yes~~/No

2. Of interest to other judges: ~~Yes~~/No

3. Revised: Yes/~~No~~

9 March 2018

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(Signature)

**B, K** **Applicant**

and

**B, P** **Respondent**

**Heard on:** 27 February 2017

**Delivered on:** 13 March 2017

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**JUDGMENT**

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**DE VILLIERS AJ**:

[1] This is an application for leave to appeal against part of my judgment dated 7 December 2017. I refer to the parties as "***Mr B***", being the applicant before me, and who was the respondent in the main application, and to "***Mrs B***" who had brought the original application.

[2] I was informed that the attorneys representing Mr B that Mrs B's attorneys withdrew after service of the notice of application for leave to appeal. I still heard the matter, as the date was arranged with both parties, Mrs B's erstwhile attorneys assisting with the arrangements.

[3] Mr and Mrs B were divorced on 21 February 2014 when this court made the following order:

> '*1. The marriage is dissolved.*
>
> *2. The Deed of Settlement (marked "B") is hereby made an order of Court.*'

[4] The agreement of settlement concluded on 11 November 2013, and that was made an order of court, contained this clause:

> '*The Defendant shall cede the benefits of the Liberty Life Retirement Annuity, No. 5…0 to the Plaintiff and shall ensure that payment of the benefits of this policy shall be made to the Plaintiff upon the selected retirement date of the 1st April 2014*.'

[5] 1 April 2014 has come can it is gone. It is common cause that Liberty Life refuses to give effect to that agreement to cede the retirement annuity. That refusal was raised first in a letter dated 23 August 2016 addressed to Mr B's attorneys and it has never been disputed. In dealing with this letter in the answering affidavit, the points raised by Mr B were non-joinder and that Mrs B has not dealt with Liberty Life's motivation for refusing to make the payment. Mr B also offered to claim the payment himself and to pay the "nett" proceeds to Mrs B. In my view, the reasons for non-payment were

obvious from the relief sought and the applicable legislation. Still, in reply, Mrs B provided the reasons that Liberty Life gave.

[6] Mrs B sought an order before me to rectify the settlement agreement in order to obtain payment of the retirement annuity. I granted ancillary relief by amending the original court order under Rule 42:

> "*Clause 2 of the order of court of 21 February 2014 under case number 2012/39127 is deleted and replaced with:*
>
> *'2. The Deed of Settlement (marked "B") is hereby made an order of Court, save for clause 7 thereof;*
>
> *3. The defendant's Retirement Annuity held with Liberty Life (Certificate Number: 5…0) is to be endorsed to pay the plaintiff 100% of the defendant's retirement annuity interest upon the selected retirement date of the 1st of April 2014.*
>
> *4. The plaintiff is responsible for payment of any and all tax liability which may be incurred by claiming the defendant's 100% from this retirement annuity*.'"

[7] Leave to appeal is sought in respect of that decision. I also dismissed a counter-application for anti-dissipation relief. No relief is sought in respect of that decision.

[8] The issue taken with my judgment is that the founding affidavit allegedly contained insufficient facts for the relief that I granted. It is alleged that I erred in allowing the case to be supplemented in the replying affidavit. It has not been suggested that Mrs B does not make out a case for the relief if the founding and replying affidavits were to be read together, as they indeed do.

[9] No issue has been taken with my findings in the main judgment that:

[9.1] The clause in the settlement agreement at the very least means that Mr B waives any claim to the retirement annuity and agrees that its proceeds are to be paid Mrs B on 1 April 2014;

[9.2] It was common cause at the hearing that the purported cession is an invalid cession;

[9.3] The concession of invalidity seems to be based on section 37A(1) of the **Pension Funds Act** 24 of 1956, a section that prohibits transfer or cession of any "*benefit provided for in the rules of a registered fund*", unless such a transfer or cession takes place in accordance with the act. No contrary reason has been suggested at the hearing or at the application for leave to appeal. If that is the case, then it necessarily must be common cause that the retirement annuity in this case is as a so-called *pension interest* as addressed below.

[10] I stated in my main judgment that it being common cause that the cession was an invalid cession (and hence could not be given effect to), it should have been common cause that the divorce order contained a patent error, and/or was given as a result of a common mistake to the parties. No reason has been suggested at the hearing or at the application for leave to appeal as to why the parties would have entered into an invalid cession, or have asked the court to make an invalid cession an order of court.

[11] The obvious error, to my mind, flows from the failure by the parties to properly comply with two acts, the **Divorce Act** 70 of 1979 and **Pension Funds Act** in concluding the divorce settlement agreement. I do not repeat the procedure set out in those two acts that a court has to follow (a) to deal with the transfer of a so-called *pension interest* (which includes a membership of a retirement annuity fund) from one spouse to the other upon divorce [sections 1(1), and 7(7) and (8) of the **Divorce Act**] and (b) to reflect the required particularity in the divorce order pertaining to the pension fund (which is widely defined) [sections 1(1), and 37D(4) of the **Pensions Fund Act**] in order not to fall foul of a finding of an invalid transfer or cession.

[12] Liberty Life, having regard to the aforesaid, refused to make payment of the retirement annuity to Mrs B. I dealt in my main judgment with the attempts by Mrs B's attorneys to amend the divorce agreement to comply with the legislated constraints, and the belligerent responses they evoked. I read those responses again, in none of them is any reason suggested why a

court should not rectify the obvious error of the parties, or that indeed the parties had intended to enter into an unenforceable cession, or that Liberty Life was acting in error of the law.

[13] I found in my main judgment that the divorce order, as it stands, cannot be given effect to and that a court should not grant an order that would be a *brutum fulmen*. As a consequence, I applied **Firestone South Africa (Pty) Ltd v Genticuro AG** 1977 (4) SA 298 (A) at 306 and 307, and as had been done in **Chiloane v Chiloane** (27836/06) [2007] ZAGPHC 183 (7 September 2007), I applied Rule 42. (I did distinguish the facts of this case and those in the **Chiloane**-case in the main judgment where no settlement agreement was involved, but still gave similar relief.)

[14] The requirements for an enforceable order of divorce dealing with the transfer of a so-called "*pension interest*", are now well known. I summarised them in my main judgment and in so doing acknowledged that I relied on some formulations as put forward in a document attached to the replying affidavit that (Mrs B averred originated from Liberty Life). This caused a degree of consternation in that it was argued at the hearing of the application for leave to appeal that my findings were based on evidence that is hearsay attached to an affidavit in reply. This is incorrect, but brings me to the central argument at the hearing of the application for leave to appeal: I was told that the central objection is that I erred in allowing Mrs B to make up for the defects in her founding affidavit in reply.

[15] The attorney for Mr B was at pains to argue that his client (allegedly) does not begrudge Mrs B from obtaining the relief agreed upon when the order of divorce was granted, but simply wanted me to dismiss the application (with costs), so that she could approach the court again (after incurring more costs), this time after having set out her case with greater precision in her founding affidavit. Mr B now wants leave to appeal to prosecute an appeal (incurring more costs) to reach an outcome that should have been reached in an exchange of letters, a variation to the settlement agreement and a simple unopposed application. The attorney for Mr B did not inform me why his client does not simply agree to give effect to the bargain that he had

struck. This matter should never have been the subject matter of an opposed application.

[16] As reflected in my original judgment, I did allow Mrs B to supplement her case in reply. She pleaded in reply sections in the **Divorce Act**, and the **Pension Funds Act**. She also, as reflected earlier, added an e-mail from Liberty Life.

[17] In so doing I exercised a discretion as the law against new matter in reply is nuanced and should be applied with common sense. I allowed Mrs B to supplement her case in reply where the facts were common cause, and she dealt in reply with the technical objection taken by Mr B that she did not plead her case with sufficient particularity. She pleaded the legal basis in reply and further corroborated the version in the founding papers. I exercised this discretion further under the following circumstances:

[17.1] As reflected in my earlier judgment-

[17.1.1] I considered the lack of a dispute between the parties as set out in the correspondence that preceded the application;

[17.1.2] I considered that the legal provisions play themselves out every Friday in the divorce court and that the requirements for valid orders are well known;

[17.1.3] Mr B will suffer no prejudice if I allow the case to be supplemented in reply with more detail about the defects in the settlement agreement;

[17.2] I add-

[17.2.1] The heads of argument submitted on behalf of Mr B raised a number of the defences of alleged prescription, non-joinder of Liberty Life, and new matter in reply. The heads of argument

foreshadowed a striking out application of the new matter in reply. It was not delivered and was not persisted with at the hearing;

[17.2.2] I was not informed of any prejudice that Mr B would suffer by the matter being decided on the affidavits as they stood. See **Smith v Kwanonqubela Town Council** 1999 (4) SA 947 (SCA) Para 15. Apart from not being able to raise technical objections, I can think of none. See **Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd** 2007 (2) SA 363 (SCA) Para 32;

[17.2.3] Even although the room for an in limine objection that the founding papers do not make out a case where there are no factual disputes, such relief was not sought at the hearing. See **Valentino Globe BV v Phillips and Another** 1998 (3) SA 775 (SCA) at 779E – 780C. No permission was sought to deal with the new matter in reply in a further affidavit;

[17.2.4] I had a discretion and a duty as an administrator of justice. In context, I would have failed in that duty had I allowed Mr B to take advantage of founding papers that were less than perfect. See **Take and Save Trading CC and Others v Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA) Para 3.

[18] Neither in the application for leave to appeal, nor in argument, was it suggested that I did not have a discretion to allow new matter in reply in an appropriate case. No authority or fact was quoted to me as to in what respect I allegedly erred in the exercise of my discretion.

[19] The test in considering leave to appeal is settled in this division. See See **Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National**

**Director of Public Prosecutions and Others** (19577/09) [2016] ZAGPPHC 489 (24 June 2016) Para 25. As set out in **Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others** 2013 (6) SA 520 (SCA) Para 24: " . . . *The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit*. . . . "

[20] The application for leave to appeal must fail.

[21] Accordingly I grant the following order:

a) The application for leave to appeal is dismissed with costs.

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**DP de Villiers AJ**

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| On behalf of the Applicant: | M J Hood & Associates |
| Instructed by: | Mr M J Hood |
| On behalf of the Respondent: | No appearance |