REPUBLIC OF SOUTH AFRICA

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

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

20/06/2019
DATE

SIGNATURE

CASE NO: **18/1355**

In the matter between:

FOURIE: JOHANNA SUSANNA Plaintiff

and

ESKOM PENSION AND PROVIDENT FUND Defendant

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] Plaintiff, Ms Fourie, is an Employee of ESKOM Holdings SOC Limited and has, since 20 March 1980, been a member of the Defendant, Eskom Pension and

Provident Fund. The Defendant is a pension fund registered in terms of section 4 of the Pension Funds Act, Act 24 of 1956 ('*The Pension Funds Act*').

[2] On 18 April 2007, this Court made an order dissolving the marriage between the Plaintiff and her ex-husband ('*the divorce order*'), and made the settlement agreement an order of this Court ('*the settlement agreement*'). Clause 4.1 of the settlement agreement provides that '*The defendant* [Plaintiff's ex-husband] *shall be entitled to one half of the plaintiff's interest in the Eskom Pension & Provident Fund calculated as at date of divorce.*' It provides further that such amount would be paid to him when it accrues to the Plaintiff.

[3] As at April 2007, the pension benefit would have accrued to the Plaintiff when she exited the Defendant, which would have been as at date of resignation or retirement.

[4] With effect from 13 September 2007, the position changed. The Pension Funds Act was amended by the Revenues Laws Amendment Act 35 of 2007 and Pension Funds Amendment Act 11 of 2007. The effect of these amendments was to change the accrual date of amounts assigned to ex-spouses of pension fund members in terms of the Divorce Act.[1] With effect from 13 September 2007, the accrual date would no longer be the date in future when a member exits the pension fund, but the date the divorce order was granted.

[5] To provide for retrospective application of these amendments, the Act was further amended by the Financial Services General Amendment Act 22 of 2008 with effect from 1 November 2008 to provide that the accrual date in respect of the divorce orders granted before 13 September 2007, would be 13 September 2007.

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[1] *Wiese v Government Employees Pension Fund* 2011 JDR 0869 (WCC) at page 4 para 8.

This second amendment affected how the Defendant should deal with the divorce order between the Plaintiff and her ex-husband.

[6] The effect of the second amendment was that the Defendant was obliged to effect a deduction to the Plaintiff's minimum individual reserve from 1 November 2008.

[7] On 12 December 2007, when the pension fund benefits had not yet accrued to the Plaintiff, the Defendant caused to be paid out to the non-member spouse, i.e. the Plaintiff's ex-husband, the sum of R1 089 474,09 and to the South African Revenue Services ('*SARS*') an amount of R531 380,00 (totalling R1 629 854,09).

[8] At the stage of the payment, the Defendant was not legally entitled to make the aforesaid payments.

[9] Pursuant to the non-retrospective amendment of Section 37D of the Pension Funds Act, the benefits that were to accrue to the Plaintiff's ex-husband, as non-member, then accrued from 1 November 2008.

[10] On 27 January 2014, this Court granted an order which provided as follows:

> "The Second Respondent [the Defendant] is to credit the Applicant's [the Plaintiff] pension interest in it with R1 629 854,09 with retroactive effect from 12 December 2007 together with any growth, interest and other benefits she would have been entitled to thereon or in respect thereof in terms of its rules since the date as effectively as if that amount had never been deduced from her pension interest."

[11] At the date of the divorce order the Plaintiff's total pension interest in the Defendant was assumed to be R2 196 948,18.

[12] None of the aforegoing facts are in dispute and no witnesses were called.

ISSUE IN THE CASE

[13] In complying with the Divorce Order, the Defendant had to revise the deemed start date of the Plaintiff in the Defendant in terms of Clause 40.2 of the Defendant's rules which provides:

> ' If the FUND is furnished with a valid court order issued in respect of a MEMBER in terms of section 7(8) of the Divorce Amendment Act, 1989 as amended, the FUND shall reduce the MEMBER's benefit payable in terms of the RULES by the amount assigned or awarded to the MEMBER's spouse in terms of such court order. The payment of such award to the non-member spouse will have the effect of reducing the MEMBER'S years of service which in effect will impact on the benefit payable to the MEMBER upon, withdrawal from SERVICE, death or retirement.'

[14] The Defendant revised the Plaintiff's deemed start date to 1 January 2001. The Plaintiff aggrieved by the Defendant's calculation, approached this Court for a declarator to the effect that the deemed start date of the Plaintiff's membership, in compliance with the Divorce Order, is 1 April 1994.

[15] The respective actuarial experts employed by the Plaintiff and Defendant agree that the actuarial methodology applied by the Defendant to calculate the reduction of the pensionable service of the Plaintiff is appropriate, that the actuarial assumptions used in the calculations are appropriate and are consistent with those used in the ongoing actuarial management of the Defendant, that the obligation for tax of R531 380 on the settlement amount must be provided for in the service adjustment calculation and that the Defendant is not liable for the tax.

[16] The experts also agree that if the tax applicable was payable by the Plaintiff, then the Defendant's calculation is correct. If on the other hand, the tax was payable by the ex-husband, then the Plaintiff's calculation is correct.

[17] Neither of the experts, is an expert on taxation.

[18] The issue which falls for determination by this court, is to determine whether it is the member or the non-member spouse who is responsible for the tax.

DISCUSSION

[19] The Authors of *Silke: South African Income Tax 2008* at p 312 deal with the issue. They state, inter alia, that:

> 'The amount deducted from the member's (assume the husband's) reserve will therefore be taxed in his hands even though it is paid to his former spouse or paid to another fund for her benefit. Any tax payable by the member as a result of the inclusion, can be recovered from the former spouse to whom the amount was paid (proviso to par 2(b)."

[20] This position was confirmed by this Court in *Russow v Reid and another*[2]. Russow also dealt with a pre 13 September 2007 divorce which was given effect to after 13 September 2007. In that case, the marriage was dissolved on 25 August 2006. Mokgoatlheng J interpreted the provisions of the Second Schedule to the Income Tax Act and concluded that:

> "[13] The tax liability accrued to the applicant's account because section 2 of the Second Schedule of the Income Tax Act 58 of 1962 provided: ..."

[21] The Applicant in the Russow matter was also the member spouse. With reference to the Second Schedule to the Income Tax Act, Mokgoatlheng J held:

> "[15] 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 2B, 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**

[2] 2011 3 All SA 106 (GSJ)

> **by and for the account of the applicant** [the member spouse] **payable by him to the Receiver of Revenue**, in terms of section 2 of the Second Schedule of the Income Tax Act 58 of 1962." (emphasis provided)

[22] At Paragraph 26 of the *Russow Judgment*, Mokgoatlheng J held that:

> "[26] The moment the first respondent elected to invoke section 37D(4)(b)(i), the tax implications sequelae were triggered and the tax liability inured to **the applicant** [the member spouse]." (emphasis provided)

[23] I am bound by the *Russow* matter unless convinced that it is clearly wrong. No argument was advanced that *Russow* was wrongly decided. Mr Du Plessis, representing the Plaintiff, attempted to distinguish this matter from *Russow* on the facts. In my view, the facts are almost identical. In this matter, the Plaintiff's ex-husband's entitlement to her pension interest was 30% and in the *Russow* matter it was 50%. There exists no principled difference on the facts.

[24] The South African Revenue Services' General Note 33 of 31 October 2008 deals with the issue, it provides:

> "Section 37D(1)(d)(ii) of the Pension Funds Act allows the fund administrator to reduce the member's minimum individual reserve **by the amount of employees' tax that is payable by the member on the assigned pension interest**. Such payment of employees' tax by the fund is also deemed to be a lump sum benefit for the purposes of the Second Schedule to the Income Tax Act **and thus taxable in the hands of the member in addition to the assigned pension interest**". (emphasis provided)

[25] In *Commissioner, South African Revenue Service v Marshall NO and others*[3], the SCA said the following regarding interpretation notes issued by SARS:

> "These interpretation notes, though not binding on the courts or a taxpayer, constitute persuasive explanations in relation to the interpretation and application of the statutory provision in question. Interpretation Note 39 has been in circulation for years and has not been brought into contention until now."

[26] The Constitutional Court warned on appeal that this Rule ought to be applied with caution. This is more so in cases where the administrator is one of the litigating parties. In *Marshall and Others v Commission for the South Africa Revenue Service*[4] the Constitutional Court held:

> "It might conceivably be justified where the practice is evidence of an impartial application of a custom recognised by all concerned, but not where the practice is unilaterally established by one of the litigating parties. In those circumstances it is difficult to see what advantage evidence of the unilateral practice will have for the objective and independent interpretation by the courts of the meaning of legislation, in accordance with constitutionally compliant precepts. It is best avoided."

[27] In *Commissioner, South African Revenue Service v Bosch*[5], the SCA per Wallis JA said:

> '[17] There is authority that in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation. This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon

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[3] 2017 (1) SA 114 (SCA) at p124 para 33
[4] 2018 (7) BCLR 830 (CC) at para 10
[5] 2015 (2) SA 174 (SCA) at p184 para 17

> those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question. As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions."

[28] The plaintiff argues that the issue turns on the wording of the provisions of clause 4.1 of the settlement agreement. The starting point in deciding how to deal with the tax obligation, so the argument goes, should be to consider the provisions of the settlement agreement. The Plaintiff argues that the parties to the divorce order specifically agreed that the Plaintiff's former spouse would be entitled to one half of the Plaintiff's interest in the Defendant calculated as at date of divorce. If one employs the suggestion by SARS, adopted by the Defendant in calculating the Plaintiff's revised deemed start date to these facts, the result would be that the Plaintiff would have given half of the value of her benefit (R2 196 948,18) to her former spouse (i.e. R1 089 474,09) and almost a quarter thereof to SARS (R531 380,00). This, so the argument goes, would be insensible, absurd *contra* to what was held in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[6] as to apply the SARS opinion by SARS blindly, without proper consideration of the facts of the matter and the provisions of the settlement agreement, would be inappropriate in these circumstances. If the Plaintiff's contentions are accepted it would give effect to the true intention of the provisions of the settlement agreement, i.e. a fair distribution of the parties' joint estate in dissolving a marriage in community of property. On all the postulations, it was submitted that the correct interpretation would be that the tax

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[6] 2012 (4) SA 593 (SCA) at [18]

obligation should be included in, and thus deducted from, the lump sum benefit which accrued to the Plaintiff's former spouse.

[29] There exists no dispute about how clause 4 is to be understood. I can do no better than to repeat the words of Mokgoatlheng J:

> 'The only contemplation that could have been in the parties' minds at the time of the execution of the settlement agreement, was that section 37D(1) of the Pension Funds Act 24 of 1956 would endure and would regulate the payment of the first respondent's [Plaintiff's ex-husband] 30% assigned interest in the applicant's [plaintiff'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 25 August 2006' [7]

[30] The legislation overtook events and the Plaintiff's remedy would have been to claim the tax back from her ex-husband but this seems not possible as his estate has been sequestrated. Mr Du Plessis, representing the Plaintiff, argued that if one employs the suggestion by SARS, adopted by the Defendant, in calculating the Plaintiff's revised deemed start date, the result would be that the Plaintiff would have given half of the value of her benefit - R2 196 948,18 - to her former spouse - R1 089 474,09 - and almost a quarter thereof to SARS - R531 380.

[31] It is unfortunate that the Plaintiff had not, at the time of payment of the benefit to her ex-husband, dealt with the consequences of the payout. The Plaintiff ought to have, by agreement with her ex-husband, set-off the tax obligation she was liable for in terms of section 2B of the Second Schedule of the Income Tax Act Act but which she could recover from him in terms of the very same section, from the amount paid to him, thereby preventing the monies from leaving the Pension Fund and having the

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[7] *Russow* (supra) at [29]

adverse effect on the Plaintiff's reserve in the fund. This impacts on the benefit payable to the Plaintiff upon withdrawal from service, death or retirement. The fact remains – the monies were withdrawn and the tax was payable by the Plaintiff.

[32] That being the case, the Plaintiff's request for a declarator must fail and the action must be dismissed with costs which should follow the result[8].

CONCLUSION

[33] Defendant's Attorneys have taken exception to the Plaintiff's voluminous trial bundle. This bundle includes heads of argument and authorities' bundles relating to contempt of court proceedings that have since been decided by this Court and have also sought punitive costs as, so the argument goes, the action has no merit. It contended that the rationale for a punitive attorney and client costs order is more than mere punishment of the losing party. Tindall JA explained it as follows in *Nel v Waterberg Landbouwers v Ko-operatiewe Vereeniging* 1946 (1) AD 597 at 607:

> "[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special consideration arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

[34] Having regard to all the circumstances of this case, I hold the view that a punitive costs order is not warranted.

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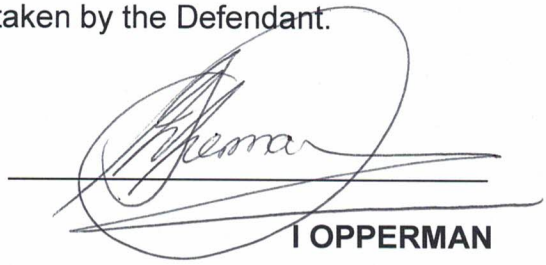
[8] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others1996 (1) SA 984 (CC)at para 155; Limpopo Legal Solutions and Others v Vhembe District Municipality and Others [2017] ZACC 14 at para 19.

[35] I accordingly make the following order:

The action is dismissed with costs including the wasted costs as tendered by the Plaintiff in respect of the exception taken by the Defendant.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 17 May 2019
Judgment delivered: 6 June 2019
Order amended by agreement between the parties: 20 June 2019
Appearances:
For Plaintiff: Adv CA du Plessis
Instructed by: Eugene Marais Attorneys
For Respondent: Adv S Khumalo
Instructed by: Bowman Gilfillan Inc.