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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 19203/2018

In the matter between:

G C

Applicant

and

A C

Respondent

JUDGMENT DELIVERED: 15 MAY 2020

SALDANHA J:

[1] On 4 May 2020 I granted an order that amended certain provisions of a divorce order (which incorporated terms of a consent paper) which had been granted in this division on 19 March 2019. I specifically ordered that the costs incurred by the

applicant's legal representative in bringing the application shall not be recovered from any party in the matter.

[2] Inasmuch as the substantive relief with regard to the variation of the consent paper was not opposed by the respondent I deem it appropriate that reasons be given for the order relating to the costs in the matter.

[3] The provisions with regard to the consent paper that required to be amended specifically related to the agreement between the applicant and first respondent with regards to their provident interests as set out fully in paragraphs 15, 16, 17, 18, 19 and 20 of their consent paper.

[4] The provisions of the paragraphs in the consent paper are:

"15 It is recorded that G has a Pension Fund as contemplated in Section 1 of the Divorce Act 70 of 1979 (as amended) in the Improvon Provident Fund administered by 1 OX Umbrella Provident Fund with Fund Registration Number: 12/8/37757 and Membership Number: [...]8, and an Allan Gray retirement annuity with account number [...]2 and investor number [...]1 as at date of divorce ("the Pension Funds"). A is entitled to a non-member's spouse's interest in G's provident fund and retirement annuity.

16. *A shall be entitled to receive 70% (Seventy Percent) of G's pension interest and retirement annuity in terms of the provisions of Section 7(7)(a) of the Divorce Act No. 70 of 1979 as amended, without any deductions from the said amount, whatsoever.*
17. *G hereby assigns 70% (Seventy Percent) of his pension interest in the Pension Fund to A. G also assigns 70% (Seventy Percent) of his Retirement Annuity in Allan Gray to A. Both the Pension Fund and Allan Gray is ordered to make an endorsement in respect of its records in accordance with Section 7(8) of the Divorce Act 70 of 1979 (as amended) and payment of the assigned pension interest and retirement annuity to A in terms of Section 37D of the Pension Funds Act 24 of 1956 (as amended).*
18. *A's 70% before tax, shall be paid into her attorney firm's trust account, within 60 (sixty) days of the granting of the order of divorce in terms of the Pension Fund Amendment Act 2007. The account banking details being as follows:*

ENDERSTEIN VAN DER MERWE INC.

STANDARD BANK

TYGER MANOR

TRUST ACCOUNT NUMBER: 3 707 40 904

BRANCH CODE: 0 50 410

REFERENCE: SWP/lg/S05207

19. *In terms of Section 7(8)(a)(ii) of the Divorce Act No. 70 of 1979 as amended, the aforesaid funds above are hereby specifically ordered to*

make payment of A's non-member spouse's pension interest and retirement annuity interest to A for which purpose this order shall serve as the necessary authority.

20. *G shall, within 10 (ten) days of the granting of the decree of divorce, take all such steps and do all such things as may be necessary in order to affect such payment by the said pension fund and investment house and provide proof thereof."*

The founding affidavit was deposed to by an attorney employed in the applicant's attorneys of record in which she set out the reasons for seeking the amendment to the provisions of the consent paper. She also motivated as to why the matter had to be dealt with urgently in the light of the restrictions under the national lockdown in terms of the Disaster Management Act No 57 of 2002 and the financial crises and vulnerability that the applicant had since found herself in.

[5] In the founding affidavit, the deponents states that the aforesaid provisions agreed to and incorporated in the consent paper between the applicant and first respondent was incomplete and was an erroneous recordal of what was actually agreed between the parties for two reasons:

- i. It had made reference to a pensions fund instead of the applicant's provident fund and

- ii. That it lacked sufficient details of the applicant's provident fund with the result that it did not fall within the ambit of Section 77 (7) and (8) of the Divorce Act 70 of 1979.

She further stated that as a consequence of this incorrect recordal, the applicant was unable to obtain payment from the 1 OX Umbrella Provident Fund. She explained that as matters stood the divorce order could not in respect of the applicant's entitlement to the first respondent's provident fund be enforced, and to that extent it was ineffective.

[6] The deponent further explained that subsequent to the divorce their offices had liaised with the first respondent's brokers (the second respondent) and provided them with a copy of the order wherein it was requested that payment be made in terms of paragraph 15 to 20. In about January 2020 the second respondent advised the applicant's attorneys that they were unable to effect payment in terms of the consent paper until such time as the wording of the consent paper had been amended. The second respondent had specifically requested that reference be made to the Umbrella Provident Fund. On 4 February 2020 the deponent's office addressed formal email correspondence to the legal representative of the first respondent requesting his consent to amend the wording of the consent paper. The deponent had subsequently also provided the first respondent's attorneys with a copy of the proposed amendment and the application. In an e-mail dated 17 April 2020 the first respondent's attorneys stated that their client had no objection to the relief sought in the urgent application to amend the consent paper and requested that a copy be provided to them once obtained.

[7] On 4 May 2020 the applicant on an ex parte basis sought the relief amending the various provisions of the consent paper as contained in this court's order of 4 May 2020.

[8] In the explanation relating to the urgency of the application the deponent stated that prior to the divorce order being granted on 29 May 2019 the applicant had been evicted from her premises due to the non-payment of monthly rental. She subsequently lived in her motor vehicle. Upon the divorce being granted and from the maintenance proceeds received from the first respondent the applicant rented residential property on a farm in Philadelphia in the Western Cape. During November 2019 the applicant received a notice to vacate the farm which she did in December 2019. The deponent stated that to the best of their knowledge the applicant returned to living in her motor vehicle. She claimed that their offices were in constant communication with the applicant after the date of the divorce since the applicant required updates on the timelines in terms of which her funds would be paid out to her in terms of the divorce order.

[9] On 18 March 2020 a legal secretary at the applicant's attorneys of record received a phone call from her. The applicant indicated that she was in a dire financial position and despite receiving monthly maintenance from the respondent she desperately required access to the funds from the second respondent in terms of the consent paper. During the telephone conversation she also advised that (i) her motor vehicle had been stolen and that she no option other than to live on the streets (ii) her cell phone had been stolen on three occasions in a short duration and that

the only way to make contact with her was for messages to be left with a person at the Cape Mental Health Society where she would attend as frequently as possible to check for messages (iii) whilst living on the street she had been the victim of sexual assault and attempts were made to rape her on more than one occasion.

[10] The deponent further explained that due to the lockdown occasioned by the Covid-19 pandemic and the declaration of a Disaster by the President in terms of the Act, their offices was only able to set up a remote infrastructure due to the regulations imposed. The deponent had however been able to make contact with Jacobs through the Cape Mental Health Society wherein she was informed that the applicant had advised that she was living on the streets and that an attempt had been made to rape her. That advised that she had access to her bank account and was desperately waiting for the pay out of funds from her ex-husband's "pension fund." The applicants arm had also been placed in a sling as a result of an injury.

[11] The deponent further explains that the initial invitation was to bring an application by way of a chamber book application but due to the limited operations of the court it was apparently not possible to do so and therefore this application was launched on an urgent basis. She also advised that there would be an approximate amount of R300 000.00 due to the applicant from the provident fund which would enable her to obtain and secure proper accommodation.

[12] It was apparent that the applicant was living under deplorable circumstances in vagaries of the street especially during the lockdown period. Moreover, it

appeared that she had reportably been a victim of both sexual and physical assaults. I was satisfied that it was appropriate that the matter be dealt with on an urgent basis to bring immediate relief to the applicant to ameliorate her physical circumstances.

[13] With regard to the initial draft order provided to the court by the applicant's attorneys no order was sought as to costs. In a telephonic discussion between the court and the applicant's counsel I indicated that I was particularly concerned about the fact that the applicant had being put to the unnecessary expense of having to launch the application as a result of the errors contained in the initial consent paper. I reminded the counsel for the applicant that whenever I dealt with undefended divorces in the Third Division I insisted as a matter of good practice that I be assured by the legal representative appearing on behalf of party concerned that provisions relating to pension or provident benefits agreed to between the parties strictly complied with the provisions of the Act and with the rules of the particular pension or provident fund. This is done and insisted upon to ensure that parties to a consent paper are not faced with the very predicament that the applicant found herself in and almost a year after the divorce order was granted in having to launch these proceedings. In any event that is axiomatically a responsibility that lies with the legal representatives of the respective parties when settling the terms of a consent paper.

[14] Moreover from the founding affidavit it was apparent that the error contained in the consent paper was not the making of the applicant nor that of the respondent but that of the legal representatives who drafted the consent paper for them.

[15] Counsel for the applicant appropriately conceded that it would not be proper that the applicant's legal representatives be entitled to recover any costs from the applicant or the respondent in the application.

[16] The unfortunate circumstances in which the applicant found herself has also been compounded by the inordinate delay of several months in bringing the application for the variation of the consent paper. Unfortunately the deponent to the founding affidavit did not provide full details for the delay.

[17] The circumstances of this matter demonstrates the importance of the provisions of consent papers relating to pension and provident funds being recorded in accordance with the provisions of Act and in accordance with the particular regulations and rules of the relevant pension or provident funds. I therefore specifically directed that the draft order be amended to reflect the considered view of the court that neither the applicant nor the respondent be required to carry the costs incurred by the applicant's legal representatives in bringing the application.

[18] The court is nonetheless mindful that the applicant's legal representatives appropriately brought the application by way of urgency in an attempt to ameliorate the crises in which their client found herself.

[19] The following order was made:

“UPON READING THE PAPERS FILED ON RECORD, AND UPON HEARING COUNSEL FOR THE APPLICANT, an order in the following terms is made:

1. That the Applicant’s non-compliance with the Rules of Court pertaining to form, process and service and that the application be heard as an urgent application in terms of the provisions of Uniform Rule 6(12)(a) read with (b), are is hereby condoned;
2. That paragraphs 15 – 20 of the Consent Paper is hereby deleted in its entirety and replaced with the following paragraphs:

PENSION INTERESTS, ANNUITIES AND POLICIES

15. It is recorded that G has a 10X Umbrella Provident Fund as contemplated in Section 1 of the Divorce Act 70 of 1979 (as amended) in the Improvon Provident Fund administered by 10X Investments (Pty) Ltd with Fund Registration Number: 12/8/37757 and Membership Number: [...]8, and an Allan Gray retirement annuity with account number [...]2 and investor number [...]1 as at date of divorce. A is entitled to a non-member's spouse's interest in G's 10X Umbrella Provident Fund and retirement annuity.

16. A shall be entitled to receive 70% (Seventy Percent) of G's 10X Umbrella Provident Fund interest and retirement annuity in terms of the provisions of Section 7(7)(a) of the Divorce Act No. 70 of 1979 as amended, without any deductions from the said amount, whatsoever.

17. G hereby assigns 70% (Seventy Percent) of his interest in his 10X Umbrella Provident Fund to A, as calculated on date of the divorce. G also assigns 70% (Seventy Percent) of his Retirement Annuity in Allan Gray, as calculated on date of divorce to A. Both the 10X Umbrella Provident Fund and Allan Gray is ordered to make an endorsement in respect of its records in accordance with Section 7(8) of the Divorce Act 70 of 1979 (as amended) and make payment of the assigned provident interest and retirement annuity to A in terms of Section 37D of the Pension Funds Act 24 of 1956 (as amended).

18. A's 70% before tax, shall be paid into her attorney firm's trust account, within 60 (sixty) days of the granting of the order of divorce in terms of the Pension Fund Amendment Act 2007. The Account banking details being as follows:

ENDERSTEIN VAN DER MERWE INC.

STANDARD BANK

TYGER MANOR

TRUST ACCOUNT NUMBER: [...]

BRANCH CODE: 0 50 410

REFERENCE: SWP/Ig/S05207

19. In terms of Section 7(8)(a)(ii) of the Divorce Act No. 70 of 1979 as amended, the 10X Umbrella Provident Fund and Allan Gray are hereby specifically ordered to make payment of A's non-member spouse's provident interest and retirement annuity interest to A for which purpose this order shall serve as the necessary authority.

20. G shall, within 10 (ten) days of the granting of the decree of divorce, take all such steps and do all such things as may be necessary in order to affect such payment by the said 10X Umbrella Provident Fund and investment house and provide proof thereof.

3. That **10X INVESTMENTS (PTY) LTD** is hereby ordered to comply with the amended provisions of paragraph 15 to 20 of the Consent Paper;
4. That the costs incurred by the Applicant's legal representatives in bringing this application shall not be recoverable from any party to this matter.

VC Saldanha

Judge of the High Court