



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

Case No: 7310/2017

In the matter between:

CHRISTINE SUSAN CAMILLERI

Plaintiff

and

ANTHONY ROBERT DE GRAAF N.O.

Defendant

**(In his capacity as the Executor of
The Estate Late Raymond Camilleri)**

JUDGMENT DELIVERED ELECTRONICALLY; Friday, 17 DECEMBER 2021

NZIWENI AJ

Introduction

[1] The Plaintiff and her deceased ex-husband got civilly married out of community of property, early in 1983. On 2 August 1999, their marriage was dissolved in the Southern divorce court in Cape Town by a decree of divorce, incorporating a Consent Paper concluded between them. In the divorce action, the Plaintiff was the defendant and the ex-husband was the plaintiff.

[2] In the instant case, the Plaintiff commenced the current action, because of a dispute arising from the terms of a Consent Paper.

[3] Initially the Plaintiff issued summonses against her ex-husband. However, the ex-husband passed away on 24 December 2018. Subsequently, the Plaintiff filed a notice to substitute the ex-husband with Anthony de Graaf in his capacity as the executor of the estate of the ex-husband, as a Defendant.

[4] In this action, the Plaintiff is suing the estate of her ex-husband, based on the terms of the Consent Paper, for the payment of the sum of R 3 225 302.66; and for an amount equivalent to one half of the nett entitlement to the ex-husband as at date of his withdrawal from the Sanlam Retirement Annuity Fund (nett of taxes), less the sum of R 10 619. 42.

[5] Through this action, the Plaintiff is seeking to enforce clauses 9.4 and 9.7 of the Consent Paper (the impugned clauses).

[6] The Defendant denies the Plaintiff's claim under the Consent Paper on various grounds. The Defendant asserts two primary arguments: (1) that the impugned clauses are void-for-vagueness; (2) in the alternative, the Defendant denies the interpretation attributed to the impugned clauses by the Plaintiff.

The Consent Paper

[7] In view of the issues raised in this matter, I consider it necessary to quote clause 8 and the impugned clauses of the Consent Paper, in order to put context to the issues.

[8] The impugned provisions of the Consent Paper are under the heading, *Plaintiff's Pension and Retirement Annuity*.

[9] The pertinent portions of the Consent Paper read as follows:

"8.2 Plaintiff's pension interests with Munich Re-insurance Company and his Sanlam Retirement Annuity are dealt with in paragraph 9 below.

PLAINTIFF'S PENSION AND RETIREMENT ANNUITY

9.1 It is recorded that the Plaintiff is a member of Munich Reinsurance Company Pension Fund.

9.2 Plaintiff consents to an endorsement being made in respect of the aforementioned Pension Fund, that 50% of his pension interest as at date of his divorce as defined in the present Divorce Act, No 70 of 1979 is due to Defendant.

9.3 Plaintiff undertakes to communicate the provisions of this paragraph to his Pension Fund in order that Defendant's entitlement herein is endorsed in the relevant records. Plaintiff undertakes to furnish proof to Defendant of his having advised the Pension Fund of the aforesaid endorsement as soon as such endorsement has been effected.

9.4 In addition to what is stated above, Plaintiff specifically agrees and undertakes to pay an additional amount to Defendant at the time of his withdrawal from the fund so as to ensure that she receives one half of the nett entitlement to him as at date of withdrawal from the Fund, (i.e. nett of all taxes). Such "additional amount" shall be paid in the same manner as Plaintiff receives his payments from the Pension Fund.

9.5 It is further recorded that Plaintiff is the holder of Sanlam Retirement Annuity Policy . . .

9.6 Plaintiff consents to an endorsement being made in the records of Sanlam that 50% of his pension interest as at date of divorce as defined in the present Divorce Act is due to Defendant. Plaintiff similarly undertakes to communicate the provisions of this paragraph to Sanlam in order that Defendant's entitlement herein is endorsed in the relevant records. Plaintiff undertakes to furnish proof to Defendant of such endorsement as soon as such endorsement has been effected.

9.7 In addition to what is stated above, Plaintiff specifically agrees and undertakes to pay an additional amount to Defendant at the time of his withdrawal from the Fund so as to ensure that she receives one half of the nett entitlement to him as at date of withdrawal from the Fund, (i.e. nett of all taxes). Such "additional amount" shall be paid in the same manner as Plaintiff receives his payments from Sanlam."

The Pleadings

[10] The Plaintiff alleges *inter alia* in the amended particulars of claim that:

"The express terms of the entitlement of the Plaintiff (who was the Defendant in the divorce action) to the pension interest in Munich Reinsurance Company

and Sanlam Retirement Annuity of the Defendant (who was the Plaintiff in the divorce action) consequent to the divorce, are set out in paragraph 9 of the Consent Paper as follows:

[11] The Plaintiff further avers that:

"The Defined Benefit Fund administered by ABSA

5. As at date of divorce (2 August 1999), the Defendant's Munich Reinsurance Company Pension Fund, which was administered by ABSA Consultants and Actuaries, comprised only a Defined Benefit Fund.
6. The value of the Defendant's pension interest in the Defined Benefit Fund as at date of divorce was R 105 297. 46.
7. Following the parties' divorce, R52 648.73 (being 50% of R105 297.46) was endorsed in favour of the Plaintiff in accordance with the provisions of the Consent Paper and duly paid to her in and during July 2011.
8. The Defendant continued to contribute towards the Defined Benefit Fund until his withdrawal from the Fund.
9. In and during February 2016, following his withdrawal from the Fund, a gross benefit from the Defined Benefit Fund of R6 872 099.67 from which tax of R316 197. 89 was deducted, translating to a nett benefit of R6 555 902.78 became due to the Defendant and, consequently, in terms of paragraph 9.4 of the Consent Paper, the Plaintiff became entitled to 50 % of this amount, namely R3 277 951. 39, less the sum of R52 648. 73 already paid to her, in total R3225 302. 66

10 Notwithstanding his obligation to pay the Plaintiff the sum of R3 225 302.66 and in breach of the terms of the Consent Paper, the Defendant instead transferred the sum of R5 372 156. 67 to an Allan Gray Living Annuity Retirement Fund and retained the cash balance after tax of R1 183746.11 for himself . . .

11. . .

The Sanlam Retirement Annuity

12. The value of the Defendant's Sanlam Retirement Annuity Fund . . . as at date of divorce was R21 238. 84.

13. Following the parties' divorce, R10 619. 42 (being 50% of R21 238. 84 was endorsed in favour of the Plaintiff in accordance with the provisions of Consent Paper and duly paid to Plaintiff in and during July 2011.

14. In terms of paragraph 9.7 of the Consent Paper, the Defendant is entitled to an additional amount from the proceeds of the Sanlam Retirement Annuity equivalent to one half of the nett entitlement to the Defendant as at date of his withdrawal from the Fund (nett of taxes.), less the sum of R10 619.42 already paid to the Plaintiff.

15. The Plaintiff is unaware of whether or not the Defendant has withdrawn from the Fund."

[12] The Defendant pleaded as follows to paras 9-11 and 14 of the Plaintiff's amended particulars of claim:

"7.1 Defendant denies that:

7.1.1 the deceased withdrew from the pension fund;

7.1.2 a net benefit of R6 555 902.78 was paid to the deceased or became due to the deceased.

7.2 In amplification without and without derogating from this denial, Defendant pleads that:

7.2.1 in terms of pension fund rules

7.2.1.1 the gross value of the deceased's pension fund benefit as at date of his retirement, before tax, was calculated to be R6 872 099.67 ("the pension benefit"), arrived at on the basis of the deceased's final pensionable salary multiplied by his pensionable service.

7.2.1.2 The deceased on retirement had the option of commuting a maximum of one- third of the pension benefit;

7.2.1.3 The deceased on retirement was obliged to purchase a compulsory pension with the balance of the pension benefit after commutation, in the form of a guaranteed annuity, a living annuity or a combination of a guaranteed annuity and living annuity pension, with a domestic insurer on the terms and conditions prescribed in the pension fund rules.

7.2.2 Pursuant to and in terms of the pension fund rules, the deceased on retirement:

7.2.2.1 elected to commute a gross amount of R1 499 943.00 of the pension benefit in payment of which the deceased received an amount of R1 183 746. 11, after deduction of R316 198.89 by the pension fund as income tax;

7.2.2.2 the balance of the deceased's pension benefit of R5 372 156.67 was used to purchase a compulsory pension in the form of a living retirement annuity with Allan Gray Living Retirement Annuity Fund during approximately February 2016.

7.3 . . .

7.4 . . . Defendant . . . denies that the deceased is liable to pay Plaintiff any amount pursuant to clause 9.4 of the consent paper on the ground that its provisions are vague and uncertain and consequently void.

7.5 Alternatively to paragraph 7.4, Defendant denies that the deceased is liable to pay Plaintiff any additional amount pursuant to clause 9.4 of the consent paper on the ground that the deceased has not withdrawn from the pension fund and accordingly the condition for payment of any additional amount to Plaintiff, in terms of clause 9.4, did not eventuate.

7.6 Alternatively to paragraphs 7.4 and 7.5 above, and only in the event of the above Court finding that clause 9.4 of the consent paper is enforceable against the deceased's estate (which is disputed), the additional amount the deceased's estate would be liable to pay Plaintiff in terms of clause 9.4 is R591 873.06, being one half of the cash amount the deceased was paid (after deduction of tax) by the pension fund, after he elected to commute the maximum amount allowable on retirement.

7.7 . . .

8. . . .

9.1 . . .

9.2 Defendant . . . denies that the deceased is liable to pay Plaintiff any amount pursuant to clause 9.7 of the consent paper.

9.3 Alternatively to paragraph 9.2, and only in the event of this Court finding that clause 9.7 of the consent paper is enforceable against the deceased estate (which is disputed), the additional amount the deceased's estate would be liable to pay Plaintiff in terms of clause 9.7 is R32 940, being one half of the cash amount (after tax) the deceased was paid by Sanlam when he withdrew from the retirement annuity fund.

The evidence

[13] The admissibility of certain evidence in the interpretation of the Consent Paper was also a contentious issue in this trial. Clearly, this court should be weary of the pitfalls of falling into the trap of admitting evidence to assist with the interpretation, which may be otherwise inadmissible.

[14] It is the Plaintiff's case that the evidence presented was not to rely on the evidence to add, vary or omit any words, expressions, sentences or terms in the contract. I understand the Plaintiff's case to be; she would like the court in its interpretation of the Consent Paper, to look at extrinsic evidence to determine whether the impugned clauses are vague or not. Additionally, the Plaintiff is of the view that if there is any vagueness, the evidence led will give clarity to the meaning of the terms in question, and will resolve any vagueness.

- [15] The Plaintiff testified and called her daughter as a witness in support of her case. There was also documentary evidence admitted as exhibits. On the other hand, Mr. De Graaf testified on behalf of the Defendant.
- [16] The Plaintiff amongst others, testified that she got married to her ex-husband in early 1983. They were married out of community of property. At the time of their marriage, her ex-husband was an assistant manager in an insurance company in Johannesburg.
- [17] She worked as a secretary at the same department her ex-husband worked in, for some time, then became a housewife and later an estate agent. When they moved to Cape Town in 1990 her ex-husband became a branch manager of the Cape Town branch. Her ex-husband worked on short and long term life policies when he worked for the insurance Company. It was her testimony that her husband wanted to have his own insurance brokerage business and they then opened a close corporation together. She was a 50% member of the close corporation. They then divorced in 1999. Her ex-husband was medically boarded from his work.
- [18] She contacted her ex-husband before May on the year of his 65 birthday and she informed him that she wanted to know about the amounts of the pension benefits. That is a brief synopsis of her testimony.

[19] To my understanding, the evidence of the Plaintiff's daughter was led to show *inter alia*, that the Plaintiff's ex-husband, after the execution of the Consent Paper, entertained the belief that the Plaintiff was entitled to the amounts she is currently claiming. I do not think the evidence of the Plaintiff's daughter took the Plaintiff's case any further. It is my firm view that the contents of her testimony borders on seeking to give a certain interpretation to the Consent Paper. It is also important to note that she testified that the alleged conversation took place after the Consent Paper was concluded.

[20] Although, I do not doubt her bona fides in testifying, I do however hold the view that her evidence is irrelevant for purposes of giving context to the Consent Paper. Particularly, considering the fact that it is merely her say so that her father conveyed the information to her during a conversation. More so, the fact that the information was given after the Consent Paper was entered into. In my view, there is not much weight, which can be attached to her testimony.

[21] Consequently, it is not even necessary to determine the question as to whether the extrinsic evidence of the daughter is hearsay evidence and/or whether it offends the parol evidence rule in the context of this case.

[22] Equally, the testimony of the Defendant's witness, Mr de Graaf, the son of the widow of the Plaintiff's ex-husband and the executor of the estate in question; did not take the case of the Defendant any further. I am thus not even going to

summarise it, save to say it dealt with rules of the funds and other relevant statutes. He also testified that he is a chartered accountant.

Issues

[23] The crisp question for determination by this court pertains to the interpretation of the Consent Paper, more so, in relations to the impugned clauses and what the Consent Paper means when it stipulated the following with reference to both clauses 9.4 and 9.7"

(a) "At the time of his withdrawal from the Fund"; and

(b) "As at date of withdrawal from the Fund"; and

(c) "the nett entitlement to him (the deceased)"; and

(d) "In the same manner as Plaintiff receives his payments from the Pension Fund/ Sanlam."

(e) Another question which the Court is called upon to determine is whether the impugned clauses are void for vagueness?

[24] The wording used in both the impugned clause are almost similar. Consequently, I am going to handle them simultaneously.

[25] In the matter of *Bath v Bath* (952/12) [2014] ZASCA 14 (24 March 2014) at paragraph 7, the court opined:

"It is trite that in ascertaining the meaning of a contract a court must have regard first to its wording. It must also consider the context or factual matrix in which it was concluded (my underlining). That is so even where the words on the face of it are clear. And where the words are ambiguous or lack clarity that is a fortiori so. But if the terms of a contract are so vague and incoherent as to be incapable of a sensible construction then the contract must be regarded as void for vagueness, as the high court in this case held." See also In the case of *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] 2 All SA 523 (SCA) at paragraph 39.

[26] The question, which aptly arises, is whether the choice of wording in the impugned clauses are incoherent, contradictory and create uncertainty or an environment of guesswork.

Meaning of the term 'at the time of his withdrawal from the Fund'

[27] In the case of *Namibian Minerals Corporation v Benguela Concessions' Ltd* 1997 (2) SA 548 (SCA) on page 561 G-I the following was expressed:

'Once a court is called upon to determine whether an agreement is fatally vague or not, it must have regard to a number of factual and policy considerations. These include the parties' initial desire to have entered into a binding legal relationship; that many contracts (such as sale, lease or partnership) are governed by legally implied terms and do not require much by way of agreement to be binding (cf *Pezzuto v Dreyer and Others* [1992] ZASCA 46; 1992 (3) SA 379 (A)); that many agreements contain tacit terms (such as those relating to reasonableness); that language is inherently

flexible and should be approached sensibly and fairly; that contracts are not concluded on the supposition that there will be litigation; and that the court should strive to uphold – and not destroy – bargains”

[28] It is now settled in our jurisprudence that if the terms of the contract are clear and unambiguous, then the language, from which the intention of the parties is to be deduced, must be accorded its natural and ordinary meaning.

[29] The decisive question is the intent of the parties, at the time of the conclusion of the Consent Paper. The nature of the agreement and the language used in the entire agreement are very critical in the determination of whether the impugned clauses are vague. Language used in a contract does not become ambiguous simply because a party characterises it as such.

[30] In this matter, it is common cause that the ex-husband of the Plaintiff left work because of medical reasons. That the Munich Reinsurance Company Pension Fund was a fund for employees. It is further not in dispute that since the Plaintiff's ex-husbands retirement, he is no longer a member of the Munich Reinsurance Company Pension Fund.

[31] It is my firm view that, the fact that a pension benefit was available to him and he received a certain amount on his retirement eloquently evinces that he ceased being a member of the Fund.

[32] The language of the Consent Paper unequivocally creates a timeline upon which the ex-husband of the Plaintiff undertakes to pay an additional amount to her. The wording of the Consent Paper demonstrates that the Plaintiff should be entitled to an additional amount from the respective Funds when that time eventuates.

[33] The Consent Paper in question is a very comprehensive document, on its face it appears complete. The Plaintiff and her ex-husband chose to use this phrase in their Consent Paper.

[34] It is interesting to note that the ex-husband of the Plaintiff worked in the insurance industry, until he was medically boarded. Initially the ex-husband of the Plaintiff was an assistant branch manager, for the insurance Company in Johannesburg. When they moved to Cape Town in 1990, he became the branch manager, of the Cape Town branch. The evidence also evinces that the Plaintiff also worked as a secretary in the insurance business. With reference to the Plaintiff's ex-husband, we are not talking about somebody who is clueless about the insurance business.

Whether the phrase promises more or less; the Plaintiff and her ex-husband must be held to the full extent of the phrase.

[35] Clearly, some of the terminology used in clause 9 of the Consent Paper is apt for the purpose of the Pension Fund and the Annuity. Quite palpably, the sense in

which the phrase is used, it is axiomatic in my view that the parties used the phrase in a sense that was not meant to have technical connotations. The phrase has no doubtful meaning. Therefore, it is necessary to give it common speech meanings.

[36] As alluded above that it is settled that if the terms of a contract are plain and unambiguous, there is no room for the application of extrinsic evidence to interpret. The court is not supposed to scrutinise the wording to bring in ambiguity where the ordinary meaning leaves no room for ambiguity.

[37] There is nothing vague or indeterminate about this phrase in question. For that matter in the pleadings, the Defendant's response to the admissions sought by the Plaintiff; the Defendant admits that her ex-husband's membership from the Munich Reinsurance Company Pension ended when following eventuated:

- (1) the ex-husband elected to commute a gross amount of the pension benefit; and
- (2) the balance of the ex-husband's (fund) was used to purchase a compulsory pension of a living retirement annuity fund with Allan Gray.

[38] Similarly, in paragraph 6 of the Defendant's reply to the Plaintiff's requests for trial particulars, the following is stated:

"Withdrawal from the Fund" as recorded in clause 9.4 of the consent paper, refers to the termination of the deceased's membership of the fund by reason of termination of his employment or the deceased resigned or his employer terminated his employment or the deceased was medically boarded.

The admissions of the Defendant are telling that there is nothing vague about the phrase in question as the Defendant could also accord meaning to it.

[39] In as much as the language or wording used in this particular phrase does not pertinently spell out as to when is 'at the time of withdrawal from the Fund'. However, it is plain on its face that the phrase 'at the time of his withdrawal from the Fund' does not by any stretch of imagination connote 'at any time', but was necessarily intended, and should be understood, to mean at such time when the deceased withdraws from the Fund. It is also quite clear that the phrase in question does not refer to 'at the time of divorce', as it is in the case in clause 9.2 of the Consent Paper.

[40] By all accounts it is evident in this matter that the condition which was imposed by the phrase in clause 9.4, was triggered when the Defendant elected to commute a certain amount of the Fund and to purchase a living retirement annuity fund with Allan Gray. The time in my view eventuated when the ex-husband upon leaving the employer could access and was allowed to withdraw money from the Fund and purchase a living retirement annuity with Allan Gray. Based on the foregoing facts, it is clear enough that this is the kind of construction, which the plainly expressed language of Consent Paper contemplates.

[41] The purchase of the Allan Gray retirement annuity, with the balance of the pension benefit, is extremely illuminating. This I say because, after the ex-husband elected to commute the amount of R1 499 943 of the pension benefit, the balance which was left was used to purchase an annuity fund. Evidently, the necessary

corollary of this would be that, the Munich Reinsurance Company Pension Fund benefits of the ex-husband's were depleted, when the ex-husband purchased the retirement annuity with Allan Gray. If this context of this case does not reveal that the Plaintiff's ex-husband withdrew from the Fund, then I don't know what will.

[42] Of course, it may be argued that clause 9.4 does not describe the phrase 'the Fund' from which the deceased withdraws. However, when one reads clause 9.4 of the Consent Paper it becomes clear that 9.4 is intended to be read with clause 9.1, of the Consent Paper. Since the heading of clause 9 refers only to the Pension Fund and the Retirement Annuity, it is apparent when one considers all the clauses contained in paragraph 9 of the Consent Paper, that they talk about the Munich Reinsurance Company Pension Fund and the Sanlam Retirement Annuity Policy. Manifestly, the Fund referred to in 9.4 is the Munich Reinsurance Company Pension Fund. It can never then be successfully argued, under the circumstances of this case, that the terms of the contract are insufficient to allow such a finding. The language used in both clauses 9.4 and 9.7 is clear and comprehensive, and if the words are given their ordinary meaning, they decisively articulate the intention of the parties.

[43] When it comes to the time of withdrawal from the Sanlam Retirement Annuity Fund, it is averred in the amended particulars of claim that the Plaintiff is unaware of whether or not the Defendant has withdrawn from this Fund. Hence, the Plaintiff does not claim a specified amount.

[44] It is also my firm view that the language used in the impugned clauses is plain.

"the nett entitlement to him"

[45] Obviously, the phrase under consideration cannot be read in isolation. I have already determined the time of withdrawal from the Fund.

[46] In my view, it is logical that when the parties concluded the Consent Paper in 1999, it was not possible to speculate or determine as to how much the nett entitlement amount would be, when the time of withdrawal of the Plaintiff's ex-husband from the Funds, eventuates.

[47] The Plaintiff in her amended particulars of claim avers that the nett benefit, which was due to her ex-husband at the time of his withdrawal from the Munich Reinsurance Company Pension Fund, was R6 555 902.78.

[48] In the Defendant's plea as amended it is stated that the gross value of the Plaintiff's ex-husband's pension fund benefit as at date of his retirement, before tax was calculated to be R 6 872 099.67. I cannot fault the averment by the Defendant pertaining to the amount of the gross value benefit.

[49] Equally, if regard is had to the pleadings of the Defendant, It becomes quite clear that it is not in dispute that the ex-husband of the Plaintiff, on reaching his

retirement in May 2015, he elected to commute R 1 499 943.00, of his pension benefit. In addition, pursuant to the ex-husband commuting the said amount, the balance of his pension fund benefit of R 5 372 156.67 was used to fund a purchase of the pension retirement annuity, with Allan Gray.

[50] Insofar as the purchase of the retirement annuity, with Allan Gray is concerned, the funds to pay for the purchase price only became available after the funds were released from the Munich Reinsurance Company Pension Fund. Similarly, it cannot be ignored that the evidence in this matter reveals that it was the retirement of Plaintiff's ex-husband that triggered the release of the funds in order to be able to pay for the purchase price of the retirement annuity with Allan Gray. Consequently, the retirement of the Plaintiff's ex-husband triggered the withdrawal from the Munich Reinsurance Company Pension Fund.

[51] Therefore, the fact that the Plaintiff's ex-husband used the balance of R5 372 156.67 to purchase retirement annuity with Allan Gray, does not of necessity translate to mean that it falls outside the phrase 'nett entitlement'.

[52] Whether the purchase of the retirement annuity was compulsory or not is neither here nor there in the context of this case. The fact of the matter is that the balance of R5 372 156.67 was never retained with the Munich Reinsurance Company Pension Fund, when the Plaintiff's ex-husband retired.

[53] Annexure "CSC3" on page 20 of the pleadings, a letter from ABSA dated 04 April 2016 from ABSA consultants and Actuaries who were administering the Munich Reinsurance Company Pension Fund states the following:

"MUNICH RE PENSION PAYOUT TO MR . . .

The pension of R449 569.88, which was transferred to Allan Gray Living Retirement Annuity Fund on 10/2/2016 is Defined Contribution.

And

The pension as calculated below which was transferred to Allan Gray Living Retirement Annuity Fund on 10/02/2016 is a Defined Benefit.

Gross Benefit	R6 872,099.67
Less transfer benefit	R5 372,196.89
Less tax amount	R 316,196.89
Nett Cash	R1 183,746.11

[54] Notwithstanding, the fact that the ex-husband did not get in hand the entire gross entitlement; it is however evident that the nett entitlement refers to the gross entitlement less the tax amount of R 316.196.89.

[55] The nett entitlement therefore is calculated as follows:

Gross Benefit R6 872, 099.67

—

Tax amount R 316, 196.89

=R6 555.902.78

[56] Of significant importance, in the context of this case, is the aspect that it is not disputed by the Defendant that the ex-husband of the Plaintiff, after his retirement received the following payments, from both Funds:

Munich Reinsurance Pension Fund	R 1 183,746.11	9 February 2016
	R237 182.56	10 February 2016
Allan Gray	R30 000.00	26 February 2016
	R24 918.92	24 March 2016
	R24, 918.92	26 April 2016
	R24, 918.92	25 May 2016
	R24, 918.92	23 June 2016
	R24, 918.91	25 July 2016
	R24, 918.92	24 August 2016
	R24, 918.91	23 September 2016
	R24, 918.92	25 October 2016

	R24, 918.91	23 November 2016
	R24, 918.92	21 December 2016
	R24, 918.91	25 January 2016
	R24, 918.92	23 February 2016
	R24,960.95	23 March 2017
	R24,960.95	24 April 2017
	R24,960.95	23 May 2017
	R24,960.95	22 June 2017
	R24,960.95	24 July 2017
	R24,960.95	21 September 2017
	R24,960.95	24 October 2017
	R24,960.95	22 November2017
	R24,960.95	20 December 2017
	R24,960.95	23 January 2018
	R24,960.95	22 February 2018
	R25,095.04	22 March 2018
	R25,095.04	23 April 2018
	R25,095.04	22 May 2018
	R25,095.04	22 June 2018

	R25,095.04	24 July 2018
	R25,095.04	22 August 2018
	R25,095.04	21 September 2018
	R25,095.04	23 October 2018
	R25,095.04	22 November 2018
	R25,095.05	18 December 2018

[57] Clearly, in the context of this case, the term '*the nett entitlement to him*' means the nett amount to which the ex-husband of the Plaintiff was entitled to, in terms of the Funds, at the time of his withdrawal from the Funds. Hence, I cannot understand on what basis it is asserted that the nature and extent of the deceased's "entitlement" is not specified nor ascertained. This Court can also not understand why it is pleaded by the Defendant that:

"[O]n proper construction of clauses 9.4 and 9.7, the words "*one half of the nett entitlement to [the deceased] as at date of withdrawal from the Fund (i.e. net of all taxes)*" means one half of the net commuted cash amount paid to the deceased (after payment of tax) on the deceased electing to commute a portion of his pension fund benefit or retirement annuity on retirement."

[58] It is further submitted in the heads of argument of on behalf of the Defendant that, in the event the court finds that clauses 9.4 and 9.7 of the Consent Paper are not void for vagueness and that the deceased's "withdrawal" from the Munich Reinsurance

Pension Fund and the Sanlam Retirement Annuity in clauses 9.4 and 9.7 of the Consent Paper also connotes retirement from the fund, in alternative, "*one half of the nett entitlement to [the deceased] as at date of withdrawal from the Fund*" in the context of clauses 9.4 and 9.7 of the consent paper means one-half of the deceased's pension interest as the date of divorce, as defined in section 1 of the Divorce Act 70 of 1979 adjusted in line with the Fund returns from date of divorce until the date of withdrawal from the Fund.

[59] From the foregoing, it is quite clear that the Defendant advances two constructions. Interestingly, both constructions proffered on behalf of the Defendant are seeking to introduce new terms, which are not promised by the Consent Paper or the factual matrix. Nothing in the Consent Paper gives any hint for such interpretation.

[60] For instance, the impugned clauses do not make mention of '*one half of the net commuted cash amount paid to the deceased. . . on the deceased electing to commute a portion of his pension fund benefit or retirement annuity on retirement.*' Nor does it mention that '*one half of the nett entitlement to [the deceased] as at date of withdrawal from the Fund*' .

[61] Certainly, a party cannot be allowed to distort the terms of a contract to suit its own narrative; and in the process ignoring the meaning intended by the parties. It is quite clear in my view that the constructions proposed by the Defendant is an attempt to introduce new terms to the Consent Paper which are not promised by it; by way of overly generous interpretation which is not even accorded by the context of the matter.

The interpretation clearly seeks to undermine the obvious purpose of the Consent Paper. The interpretation sought by the Defendant in this regard is entirely forced and unwarranted.

[62] Moreover, the contention on behalf of the Plaintiff, that the interpretations sought by the Defendant are unbusinesslike, cannot be faulted. Commercially or otherwise, both interpretations sought by the Defendant are not sensible and practical in the context of this case. Therefore, they cannot be preferred.

[63] The factual matrix of this case evinces that although the parties were married out of community of property, the ex-husband of the Plaintiff was very generous towards the Plaintiff. It should also not be ignored that the Plaintiff was not going to receive spousal maintenance.

[64] In the circumstances, it can never be correct that the Plaintiff is only entitled to the commuted amount. Palpably, there is no factual basis in the context of this case in support of such assertion. In this case, it is readily apparent that it would not have made good business sense for the Plaintiff, who was not going to receive spousal maintenance, even if she was going to receive a close corporation, to agree to the terms proposed by the Defendant.

[65] Additionally, much was made on behalf of the Defendant about the rules of the Pension Fund not allowing a construction of clause 9.4, to the effect that it conferred

on the Plaintiff an entitlement to 50 % of her ex-husband's entire retirement benefit in 16 years time. It is further Defendant's contention that the construction is nonsensical and unbusinesslike and in conflict with the statutory prohibition against alienation of pension benefit.

[66] To my mind, the Consent Paper does not fall foul of the provisions of section 37 A (1) of the Pension Funds Act 24 of 1956. This is so because the ex-husband of the Plaintiff did not transfer, or cede his pension benefit or his rights to such benefit.

[67] Primarily, the facts of this matter are clearly distinguishable from the case of *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SA). This is so because, in the *Swemmer* case the non-member spouse was awarded sole ownership of the retirement annuities in terms of the agreement reached by her and her husband. She then demanded from the insurance company to replace the member spouse, with her as an owner of the pension benefits. By necessary implication, this meant that she was going to substitute her husband as a member of the pension benefits, which had not yet accrued. She also wanted to exercise the rights of the member spouse.

[68] Yet, in the present case, the Plaintiff is simply seeking to share half of the pension benefits after the pension benefits accrued. No forfeiture or exercise of the rights of a member spouse was ever sought in the present case, as it was done in the *Swemmer* case.

[69] In the instant case, the Plaintiff does not require any right other than the payment of her share from the pension benefits; as promised by the agreement she signed with her ex-husband. Additionally, the demands made by the Plaintiff in this case, as evinced by the evidence and this court's finding were lodged after the accrual of the pension benefits.

[70] The Consent Paper in the case in *casu* does not contemplate any forfeiture of a pension benefit. Hence it cannot be in conflict with the provisions of sections 7 (7) and 7(8) of the Divorce Act 70 of 1989, read with section 37 A of the Pension Fund Act 24 of 1956. Therefore, this contention cannot be sustained in the context of this case.

[71] Consequently, in terms of the impugned clauses the Plaintiff is entitled to the half of the nett entitlement of both the Munich Reinsurance Company Pension Fund and the Sanlam Retirement Annuity; as at date of withdrawal from the Fund.

"In the same manner as Plaintiff receives his payments from the Pension Fund/ Sanlam."

[72] First and foremost, it clear from the facts of the instant case as to how the Plaintiff's ex-husband received his nett benefit payments. The first portion is the one he commuted, the other one, is the one he used in order to buy Allan Gray annuity. Apparently, as far as the Allan Gray Annuity is concerned, the Plaintiff's ex-husband was receiving monthly payments from Allan Gray, until his passing away. This is how

the Plaintiff should have been paid. She should have received half of those monthly payments.

[73] Unfortunately a new event has occurred which was the death of the deceased. When the deceased passed away the Plaintiff never received anything from the Allan Gray annuity nor from the commuted amount. This therefore means that, as far as the Munich Reinsurance Company Pension Fund is concerned, the estate owes the Plaintiff an additional amount as calculated by the Plaintiff in the amended Particulars of claim.

Conclusion

[74] On the basis of the foregoing facts, I am satisfied that the terms of the impugned clauses are not vague. The Consent Paper traverses everything clearly and comprehensively. In light of ordinary meaning of the words contained in the Consent Paper and the relevant context mentioned hereinabove, I am convinced that the intent of the parties is articulated beyond any shadow of doubt. I therefore agree with the Plaintiff's interpretation of the impugned clauses.

[75] Accordingly, I make the following order:

The Defendant shall pay:

- (a) Payment of the sum of R3 225 302.66;
- (b) Interest on the aforesaid amount at the prescribe legal rate from the date of Defendant's withdrawal from the Define Benefit Fund to date of payment;

- (c) Payment of the sum equivalent to one half of the nett entitlement to the Defendant as at date of his withdrawal from his Sanlam Retirement Annuity Fund (nett of taxes), less the sum of R10 619.42;
- (d) Interest on the aforesaid amount at the prescribed legal rate from date of the Defendant's withdrawal from his Sanlam Retirement Annuity Fund to date of payment;
- (e) Costs of suit.



CN NZIWENI
Acting Judge of the High Court

Appearances

Counsel for the Plaintiff : Adv JA Van Der Merwe SC
Instructed by Ashersons Attorneys
Ref: R Weiner

Counsel for the Defendant : Adv B Gassner SC
Instructed by De Klerk & Van Gend Inc.
Ref: S Duffett