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**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 565/2022

In the matter between:

ANTHONY ROBERT DE GRAAF NO

APPELLANT

and

C[...] S[...] C[...]

RESPONDENT

Neutral citation: *De Graaf NO v C[...] (565/2022) [2023] ZASCA 117 (03 August 2023)*

Coram: SALDULKER, MOCUMIE and MEYER JJA and NHLANGULELA and DAFFUE AJJA

Heard: 12 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 03 August 2023.

Summary: Family law – divorce – interpretation and enforceability of clauses of a consent paper concluded by ex-spouses governing the ex-wife's entitlement to (i) the ex-husband's pension fund with his previous employer; and (ii) the ex-husband's

retirement annuity – whether the impugned clauses of the consent paper are vague, and should be interpreted to mean that the ex-husband agreed to pay to the ex-wife half of his entire retirement benefits – held that the impugned clauses are clear – half of his net entitlement must be interpreted to mean that the ex-husband agreed to pay to the ex-wife 50% of one-third of the amount which the ex-husband could have commuted less tax as at date of his withdrawal from the pension fund.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Nziweni AJ, sitting as court of first instance).

- 1 The appeal is upheld to the extent set out below.
- 2 The order of the high court is set aside and substituted with the following order:

‘The defendant shall pay to the plaintiff:

 - a. The sums of R805 125.00 and R22 320.94 in respect of clauses 9.4 and 9.7 of the consent paper respectively.
 - b. Interest on the aforesaid amounts at the prescribed legal rate from date of the defendant’s withdrawal from the Munich Reinsurance Company Pension Fund and the Sanlam Retirement Annuity Fund respectively to date of payment.
 - c. Each party to pay their own costs of suit.’
- 3 Each party to pay their own costs of the appeal.

JUDGMENT

Saldulker JA (Mocumie and Meyer JJA and Nhlangulela and Daffue AJJA concurring):

[1] This appeal is against the judgment of the Western Cape Division of the High Court, Cape Town, per Nziweni AJ (the high court), which granted payment in favour of the respondent, Ms C[...] S[...] C[...], against the appellant, Mr Anthony Robert de Graaf NO, the executor of the estate of her late husband, Mr R[...] C[...] (the deceased) for a claim in respect of his pension interests. Payment was awarded in the amount of R3 225 302.66 with interest thereon, which represented 50% of the value of the deceased’s retirement benefit, as a defined benefit member of the

Munich Reinsurance Company Pension Fund (MR pension fund), net of tax, less an amount which the fund had previously paid to the respondent directly. Additionally, the respondent claimed and was awarded payment of an unspecified sum equivalent to 50% of the deceased's net entitlement as at date of his withdrawal from the Sanlam Retirement Annuity Fund (the Sanlam RA), net of tax, less the sum of R10 619.42, which had previously been paid to her.

[2] The deceased and the respondent were married in 1983, out of community of property, with the exclusion of the accrual system. On 2 August 1999, they were divorced and a consent paper which was concluded by them was incorporated in the divorce order that was made an order of court. The deceased's pension interests in the MR pension fund and the Sanlam RA are dealt with in paragraph 9 of the consent paper, which is set out below:

9.1 It is recorded that 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 No. 9282632X0.

9.6 Plaintiff consents to an endorsement being made in the records of Sanlam that 50% of his pension interest as at the 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.’ (My emphasis.)

[3] Sub-clauses 9.1 to 9.3 and 9.5 and 9.6 concern the appellant’s pension and retirement benefits in the MR pension fund and the Sanlam RA, respectively, and are worded in the standard form used by practitioners at the time. However, and contrary to the usual clauses dealing with pension interests, the parties’ agreement contains two further clauses, to wit 9.4 and 9.7, the interpretation of which is the central issue in this appeal.

[4] A dispute arose between the respondent and the deceased with regard to the interpretation of the impugned clauses, 9.4 and 9.7. Initially, she accordingly instituted action against the deceased, but when he passed away on 24 December 2018, the appellant was substituted in his capacity as the executor of the estate of her deceased husband. It is the respondent’s case, which the high court accepted to be correct, that she is entitled to 50% of the deceased’s entire pension and retirement annuity benefits accumulated during the marriage as well as after the divorce to the date of the deceased’s exit from the MR pension fund and the Sanlam RA, respectively. The appellant argues that the respondent is not entitled to any portion of the deceased’s pension interest on the bases that the impugned clauses are vague, unenforceable and void. Alternatively, he argues that the respondent is only entitled to 50% of the deceased’s pension interest growth based on an actuarial calculation made by the fund. The amount of R52 648.73 as at date of divorce increased to R212 802.57, a growth of only R160 154. Further alternatively, he argues that at best for the respondent, she is entitled to 50% of the net commuted cash amount paid to the deceased which he elected to commute, less the R52 648.73, the amount being R539 224.

[5] The high court concluded inter alia, as contended for by the respondent, that the impugned clauses providing for additional payments should be interpreted to mean that the deceased agreed to pay to the respondent 50% of his entire

retirement benefits in the MR pension fund and in his Sanlam RA which were accumulated during his marriage and also the period after divorce. The high court further held that the impugned clauses were not vague, as submitted on behalf of the appellant, and made an order for the payment in the amount reflected above. Aggrieved, the appellant applied for leave to appeal the judgment and order, which was refused by the high court. This appeal is with the leave of this Court.

[6] Some background is necessary. The deceased worked for Munich Reinsurance Company, initially as a manager in foreign shipping, and later as manager of the Cape Town branch, where he dealt with all aspects of insurance, both short and long term, life policies and pension funds. The respondent was a secretary at Munich Reinsurance Company when she married the deceased. At the time of the divorce, the deceased was a member of the MR pension fund. The deceased also held the Sanlam RA. On 2 August 1999, the date of divorce, the deceased's pension interest in the MR pension fund, as defined in s 1 of the Divorce Act 70 of 1979 (the Divorce Act), was R105 297.46 and R21 238.84 in the Sanlam RA. The respondent was unable to withdraw 50% of these amounts assigned to her until the deceased's exit from the MR pension fund and Sanlam RA respectively, and neither did the amounts attract any growth. This was as a result of the existing law at the time.

[7] On 17 December 1999, the deceased married Ms T[...] C[...] (T[...]) in community of property. When the consent paper was concluded, the deceased and T[...] were already living together and planning to marry. T[...] is the surviving widow of the deceased. In 2011 and years before the deceased retired, the MR pension fund paid to the respondent at her request R52 648.73, being 50% of the deceased's pension interest in the MR pension fund, assigned to her in terms of clause 9.2 of the consent paper. Sanlam also paid the respondent directly an amount of R10 619.42, being 50% of the deceased's pension interest in the Sanlam RA as at date of divorce, assigned to her in terms of clause 9.6 of the consent paper. As mentioned, payment of these assigned amounts was not possible in 1999 when the parties

divorced, but became possible because of the amendment of the Pension Funds Act 24 of 1956 (the PFA),¹ which introduced s 37D(4)(d) of the PFA.

[8] The gross value of the deceased's retirement benefit, as a defined benefit member of the MR pension fund on his retirement in May 2015, was R6 872 099.67 before tax (pension benefit), arrived at on the basis of the deceased's final pensionable salary multiplied by his pensionable service. In terms of the MR pension fund rules the deceased was not entitled to take his entire retirement benefit in cash. On retirement the deceased had the option of commuting a maximum of one-third of the pension benefit in cash. He 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 MR pension fund rules. The deceased elected to commute less than the maximum one-third pension benefit in cash, to wit a gross amount of R1 499 943, of which he received an amount of R1 183 746.11 after the deduction of R316 196.89 for income tax. 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.

[9] Pension interest is defined in s 1 of the Divorce Act as follows:

‘[P]ension interest in relation to a party to a divorce action who-

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975, for the purposes of that Act.’

¹ In terms of s 16(c) of the Financial Services Laws General Amendment Act 22 of 2008.

[10] Pension fund in turn is defined in the Divorce Act as follows:

‘[P]ension fund means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956, irrespective of whether the provisions of that Act apply to the pension fund or not.’

[11] Sub-sections 7(7) and 7(8) of the Divorce Act read as follows:

‘(7)(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply *mutatis mutandis* with regard to the right of that other party in respect of that part of the pension interest concerned.’

[12] Section 1 of the PFA defines a benefit in relation to a fund as any amount payable to a member or beneficiary in terms of the rules of that fund. Section 37A(1) of the PFA and 37D limit the circumstances under which deductions or reductions may be effected from a benefit. Section 37A(1) specifically protects a 'benefit . . . or right to such benefit' from 'being reduced, transferred or otherwise ceded'. Deductions are permitted only under the provisions of the Income Tax Act 58 of 1962 and the Maintenance Act 99 of 1998, and in accordance with s 37D of the PFA.

[13] As mentioned above, at the time the deceased and the respondent divorced in 1999, the legislative provisions were such that a party could not obtain immediate payment of the pension interest assigned to such a party at date of divorce. The statutory framework in 1999 governing a non-member spouse's entitlement to a member spouse's pension interest, which underpinned the consent paper in the present matter, was discussed in *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer*.² This Court pointed out that ss 7(7) and 7(8) of the Divorce Act had to be read together with s 37A of the PFA, which prohibits the cession or transfer of a member's pension benefits or the right to such benefits.³

[14] The Constitutional Court summarised the legislative history of the rights of non-member spouses to the pensions of member spouses in *Wiese v Government Employee's Pension Fund*.⁴ The Constitutional Court confirmed that a so-called 'clean break principle' was introduced by the Pension Funds Amendment Act 11 of 2007 into s 37D of the PFA in terms of which a non-member spouse entitled to a share in the pension interest of a member spouse did not have to wait until the member spouse exited the fund in order to obtain payment.

[15] In *Sentinel Retirement Fund and Another v Masoanganye and Others*⁵ (*Sentinel*), this Court confirmed that once a member's pension interest is paid over, it loses its protection. The court said:

² *Old Mutual Life Assurance Co (SA) Ltd and Another v Swemmer* 2004 (5) SA 373 (SCA).

³ *Ibid* para 24.

⁴ *Wiese v Government Employees Pension Fund and Others* [2012] ZASCA 5; 2012 (6) BCLR 599 (CC) paras 5-7.

⁵ *Sentinel Retirement Fund and Another v Masoanganye and Others* [2018] ZASCA 126 (SCA) para16.

[16] This brings me to the real issue in this case; whether the restraint order requires the Fund to pay the money into Mr Ndebele's personal banking account and not to an account designated by the curator. The high court held that once a benefit is paid to the member, and he ceases being a member, the protection afforded to the benefit by s 37A(1) falls away and the pay-out then becomes part of the general estate of the former member. For this conclusion the learned judge relied upon the judgments in *Van Aartsen v Van Aartsen* and *Foit v First Rand Bank BPK*. I did not understand the Fund to take issue with the correctness of this statement of the law.'

[16] Context is everything. In order to give context to the consent paper entered into it is important to take into account the circumstances surrounding the terms of the consent paper. It appears that notwithstanding their marital regime, the parties divided their assets accumulated by them during their marriage on a fifty-fifty basis. The parties waived maintenance from each other. The respondent and the deceased considered the terms very seriously, were legally represented by experienced divorce attorneys and had no doubt about its enforceability and implementation.

[17] Furthermore, with regard to the implementation of the consent paper, the deceased would have known that he could not access the full pension benefit. The two-thirds of the pension benefit, which was used to purchase the Allan Gray Living Retirement Annuity Fund, did not fall into the deceased's estate. If one considers the deceased's total assets at the time of his death, his estate would have been insolvent if the respondent's claim was accepted as valid.

[18] Nevertheless, there can be little doubt that the parties intended that the respondent would be entitled to an additional amount, over and above that provided for in the Divorce Act. The wording of the impugned clauses of the consent paper are not vague, but clear and unambiguous. The terms were clear from the wording through which the parties expressed their contractual intention in light of all the relevant facts and in context, including the circumstances in which the consent paper was entered into.⁶ An examination of the clauses of the consent paper reveals that

⁶ *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* [1997] 1 All SA 191 (A); 1997 (2) SA 548 (A) at 557. See also *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; [2014] 1 All SA 517 (SCA); 2014 (2) SA 494 (SCA); *University of*

the words 'in addition' are repeated in both the impugned clauses 9.4 and 9.7. The deceased specifically agreed and undertook to pay an additional amount to the respondent at the time of his withdrawal from the fund (net of all taxes) in respect of the MR pension fund and the Sanlam RA. It was agreed between the deceased and the respondent that this was to ensure that she receives 'one-half of the nett entitlement to him as at date of withdrawal from the fund'. The additional amount in both instances would become due, at date of the deceased's withdrawal from the funds, which can only mean at the time when he exits the funds.

[19] Thus, if consideration is given to the language, context and the purpose of the consent paper, it accords with the overall structure of clause 9. The contractual intention of the deceased and the respondent is clearly expressed and textually clear from the words used in clauses 9.4 and 9.7.

[20] In terms of the MR pension fund rules the maximum net entitlement to the deceased was one-third of the total net amount (after taxation). The deceased was not entitled to the full pension benefit as at date of exiting the fund, which was far in excess of R6 million. The impugned clauses have been formulated in such a way between the respondent and the deceased so as not to fall foul of the prohibition against cession or transfer of the deceased's right to the pension benefit in s 37A(1) of the PFA, which prohibits cession of pension benefits. The impugned clauses provide for the payment by the deceased to the respondent of 50% of his net entitlement to the funds in line with the decision in *Van Aartsen v Van Aartsen*⁷ and applied in *Sentinel*. The undertaking was to pay the respondent once the proceeds had been paid out to him.

[21] The high court made an error in calculation by deducting tax in the amount of R316 196.89 from the entire gross entitlement of R6 872 099.69 in order to arrive at a net entitlement of R6 555 902.78 and concluding that the respondent was entitled to 50% of this amount, namely R3 277 951.39 less the sum of R52 648.73 already paid to her, arriving at an amount of R3 225 302.66. It is apparent from the record

Johannesburg v Auckland Park Theological Seminary and Another [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 65.

⁷ *Van Aartsen v Van Aartsen* 2006 (4) SA 131 (TPD) paras 21-23.

that the amount of R316 196.89 was the tax payable by the deceased on the cash commuted. Furthermore, the high court's order fell foul of the prohibition against cession of pension fund interest. Finally, the high court failed to consider that the respondent was only entitled to 50% of the deceased's net entitlement at date of withdrawal from the MR pension fund, which, as indicated, could not be more than one-third of the MR pension fund benefit.

[22] In practice the deceased elected to commute less than the maximum one-third pension benefit in cash. However, the deceased could not elect to commute a lesser amount than the 'nett entitlement to him', as in doing so he would be flouting the meaning intended by the parties as clearly recorded in the impugned clauses and clause 9.4 in particular.

[23] In view of all of the above, in regard to the MR pension fund, the respondent is entitled to only 50% of one-third of the net pension benefit that the deceased was entitled to. The respondent's entitlement in respect of the Sanlam RA is dealt with further below.

[24] At the hearing of this matter the parties were requested to provide this Court with agreed amounts payable in respect of the deceased's entitlement in the MR pension fund based on certain assumptions which the appellant should be ordered to pay pursuant to clause 9.4 of the consent paper. The legal representatives obliged and presented the following amounts based on two scenarios:

(A) First scenario: on the assumption that 'the one half of the nett entitlement to him as at date of withdrawal from the Fund (i.e. nett of all taxes)' refers to one half of the net entitlement of the one-third that the deceased could have commuted less tax, which amounts to R805 125.00. This is made up as follows:

(i)	Gross benefit	R6 872 099.67
(ii)	$\frac{1}{3}$ commuted	R2 290 699.89
(iii)	Less tax	(R577 151.96)
(iv)	Net after tax	R1 713 547.93
(v)	50% thereof	R856 773.96
(vi)	Less amount already paid to the respondent	<u>(R52 648.73)</u>
(vii)	Amount payable	<u>R805 125.00</u>

(B) Second scenario: on the assumption that the court finds that the entitlement within the meaning of clause 9.4 is limited to 50% of the amount that the deceased actually commuted after tax, then the agreed amount would be R539 224.00. This is calculated as follows:

(i)	Net proceeds commuted after tax	R1 183 746.11
(ii)	50% thereof	R591 873.06
(iii)	Less amount already received by the respondent	<u>(R52 648.73)</u>
(iv)	Amount payable	<u><u>R539 224.00</u></u>

[25] Accordingly, this Court finds that the respondent is entitled to the amount as per the first scenario (A) set out above. The appeal must therefore succeed to the limited extent set out in the order.

[26] In paragraph (c) of the order of the high court the amount to be paid to the respondent in respect of the Sanlam RA was not determined. The respondent is entitled to 50% of the deceased's net entitlement in this fund as at date of withdrawal from the fund, less the sum of R10 619.42, which she has already received. The parties are not in agreement as to the correct amount, although they agree that this fund has paid out R65 880.72 to the deceased in May 2015. 50% thereof is R32 940.36, from which the amount of R10 619.42 previously received must be deducted. The amount due to the respondent is therefore R22 320.94.

[27] Although the respondent obtained success in the high court, the final result is remarkably different from what she intended to obtain. Therefore, it would be just and equitable not to grant her the costs of the action in the high court, but to order each party to pay their own costs. Although the appellant has obtained some success in this Court, in the circumstances of this case, it would be just and equitable that each party bears their own costs of the appeal.

[28] In the result, the following order is made:

- 1 The appeal is upheld to the extent set out below.
- 2 The order of the high court is set aside and substituted with the following order:

'The defendant shall pay to the plaintiff:

- a. The sums of R805 125.00 and R22 320.94 in respect of clauses 9.4 and 9.7 of the consent paper respectively.
- b. Interest on the aforesaid amounts at the prescribed legal rate from date of the defendant's withdrawal from the Munich Reinsurance Company Pension Fund and the Sanlam Retirement Annuity respectively to date of payment.
- c. Each party to pay their own costs of suit.'

3 Each party to pay their own costs of the appeal.

H K SALDULKER
JUDGE OF APPEAL

Appearances

For the appellant:

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