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.	**CASE NO: A3122/2017**
……..	……...
Date	**ML TWALA**

In the matter between:

S: P **APPELLANT**

AND

S: T **RESPONDENT**

JUDGMENT

TWALA J

[1] This appeal concerns the order varying the divorce settlement agreement entered into by the parties which was made an order of court by the Regional Court Magistrate sitting in Johannesburg on the 12th of May 2016. The magistrate varied the order on the 9th of June 2017.

[2] The application to vary the settlement agreement between the parties which had been made an order of court could not be decided on the papers because there was a dispute of fact – hence the magistrate called for oral testimony.

[3] It is common cause that the parties were divorced on the 12th of May 2016 when they concluded a settlement agreement which was made an order of court. It is not in dispute that with regard to the parties' proprietary rights to the pension fund interests, the appellant presented an actuarial calculation by Gerald Jacobson Consulting Actuaries (Jacobson). It is settled between the parties that the actuarial calculation presented two pension fund benefit schemes of the appellant, (a) the Johannesburg Municipal Pension Fund, and (b) the City of Johannesburg Pension Fund. It is further not in dispute that in terms of the settlement agreement the respondent was to receive 40% as her share of the pension fund interest of the appellant.

[4] It is apparent from the record that the parties were married to each other in community of property on the 19th of November 1987. The respondent instituted divorce proceedings against the appellant in November 2011. On the 28th of January 2014 the appellant made discovery and included the City of Johannesburg

Pension Fund and the title deed of Erf […] Zone 4 Pimville Soweto as his assets in its discovery affidavit.

[5] In a nutshell the testimony of the respondent was that she knew that the appellant was a member of a pension fund but did not know that he was a member of two pension fund schemes. She saw the report by Jacobson for the first time when she was appearing in court on the 12th of May 2016. She was shown the document which had an amount written in manuscript as the amount she was to receive from the pension fund interest of the appellant.

[6] On the 12th of May 2016, as testified by Ms Rizzotto who was the attorney for the respondent when the matter was set down for hearing, the parties held settlement discussions and the appellant produced the actuarial report by Jacobson. She did not notice that the actuarial report referred to two pension fund benefit schemes but negotiated settlement on behalf of her client at 40% based on the figure that represented the total amount on the Jacobson's report which was then hand written on the report amounting to R1 012 836.40. She then prepared and or amended the settlement agreement and she advised her client to sign it on the basis that she (client) was to receive a pension fund interest in the sum of R1m and the house in Soweto. She only became aware of the second pension fund of the appellant when she lodged a claim for her client and the correspondents reflected a sum of R214 023.50 as an amount due to her client instead of the expected R1m. She was given the pension number by the attorney for the appellant who did not disclose to her that there are two pension fund interests. At all times she was concentrating on the total figure on Jacobson's report but never noticed that it related to two pension fund schemes. She then advised her client to institute the proceeding to vary the settlement agreement. She denied that there was an issue whether the division of the joint estate between the parties was fair or not.

[7] The appellant testified that the agreement that the respondent will be entitled to 40% of the City of Johannesburg Pension Fund was based on the premise that she was also entitled to the property in Soweto which has more value than the property in Polokwane which is tribal land. He insisted that there was more than one meeting held at the respondent's attorney's offices where all these discussions took place and were agreed upon. It was agreed in these meetings that the Johannesburg Municipal Pension Fund be excluded. He conceded that they did not know the value of the City of Johannesburg Pension Fund at the time but it was agreed on his estimate that the respondent will receive 40% as her share in that pension fund.

[8] It is trite law that in interpreting any document, the court must consider all the facts and the circumstances under which such document or contract was concluded. The starting point remains the words in the document, the background facts and the intention of the parties.

[9] It is apposite at this stage to refer to the relevant provision of the settlement agreement which reads as follows:

"7.3 Pension

7.3.1 That 40% (Forty percent) of the Defendant's pension interest as defined in Section 1 of the Divorce Act 70 of 1979, in the City of Johannesburg Pension Fund, membership and employee number being 300 14913, be paid to the Plaintiff.

7.3.2 The City of Johannesburg Pension Fund is ordered to endorse its records accordingly and make payment directly to Plaintiff of the amount due to her within 60 (sixty) days of her request, on presentation of this court order."

[10] In *Novartis v Maphil [2015] ZASCA 111, 2016 (1) SA* the Supreme Court of Appeal per Lewis JA alluded to the following:

"*[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. KPMG, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention.*

[28] The passage cited from the judgment of Wallis JA in Endumeni summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Norvatis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paragraphs 10 to 12 and in North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd [2013]ZASCA 76; 2013 (5) SA 1 (SCA) paragraphs 24 and 25. A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand & others v Bryant [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look at surrounding circumstances, Wallis JA said (para 12 of Bothma-Botha):

> *'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].*

[30] Lord Clarke in Rainy Sky in turn referred to a passage in Society of Lloyd's v Robinson [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

> *'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe*

them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in Hillas & Co Ltd v Arcos Ltd 147 LTR 503 at 514:

'Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.'

[11] I find myself in disagreement with counsel for the applicant in that it was agreed between the parties that the respondent will receive 40% of the City of Johannesburg Pension Fund interest because she was getting the house in Soweto. It is clear from the conspectus of the matter that the respondent was not aware that there were two pension fund schemes in which the appellant was a member. The appellant deliberately withheld that information to the respondent – hence he discovered only the City of Johannesburg Pension Fund and provided the respondent with the number for that pension fund only.

[12] I am unable to disagree with counsel for the appellant that the attorney for the respondent was negligent in not reading the Jacobson's report properly and effect the necessary amendments to include the figure of R1m as the 40% share due to her client as reflected in Jacobson's report in manuscript. However, that imputation on the attorney, coupled with the conspectus of the facts of the matter, does not take away the duty of the court to construe the document fairly and broadly. It is not in the interest of justice for this court to be astute and subtle in finding defects in the agreement between the parties.

[13] Ms Rizzotto in her unchallenged testimony confirmed that, although she did not insert the figure of R1m on the settlement agreement, it was on the basis of the figure that is reflected on the Jacobson's report in manuscript that the matter was settled between the parties. I am of the view therefore that the appellant's attorney produced the Jacobson's report on the date of trial to facilitate settlement of the matter and the agreement was concluded that the respond will receive 40% of the pension fund interest of the appellant based on the figure on Jacobson's report.

[14] I agree with counsel for the respondent that it was not necessary to insert the figure of R1m on the settlement agreement for the figure would change when worked out by the pension fund when payment is made some time after the order. Common sense suggests that, although the figure would not drastically change, but it is prudent to leave it in the hands of the pension fund to do the calculation. It is my respectful view therefore that there is no merit in the submission that the figure of R1m should have been reflected in the settlement agreement if it was the figure that was agreed upon on the 12th of May 2016.

[15] I agree with counsel for the appellant that the respondent signed an agreement for 40% in the City of Johannesburg Pension Fund interest of the appellant. However,

she did so under the belief, and that of her attorney, that her 40% share in City of Johannesburg Pension Fund amounts to R1m as was presented to her during the settlement negotiations on the day of trial of her matter. It is my considered view therefore that, there was no agreement between the parties to exclude the Johannesburg Municipal Pension Fund from settlement agreement and therefore the appeal falls to be dismissed.

[16] In the circumstances, I make the following order:

The appeal is dismissed with costs.

_____

TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

I agree

_____

MATSEMELA AJ

ACTING JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, GAUTENG LOCAL DIVISION

Date of hearing: **09 October 2018**

Date of Judgment: **29 October 2018**

For the Appellant: **Adv MJ Mojela**
Instructed by: **TF Mathebula Attorneys**
Tel: 011 333 7298

For the Defendant: **Adv. C Snoyman**
Instructed by: **Ratshivhombela Attorneys**
Tel: 011 4920042