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**IN THE HIGH COURT OF SOUTH AFRICA**



**(GAUTENG DIVISION, JOHANNESBURG)**

**CASE NO: 01778/ 2013**

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

.....22/9/2016.....  
DATE

.....  
SIGNATURE

In the matter between

G, K

**APPELLANT(PLAINTIFF)**

and

G, A W

**RESPONDENT(DEFENDANT)**

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**JUDGMENT DELIVERED ON 22 SEPTEMBER 2016**

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**VILAKAZI, AJ:**

[1] This is an application for leave to appeal against the judgment I handed down on 12 February 2016 in which I granted the following orders;

(a) the appellant is ordered to make accrual payment to the respondent an amount of R 267 510 together with interest thereon at 15.5% from date of judgment to date of final payment;

(b) the appellant to pay the respondent's costs;

(c) a Receiver and Liquidator to be appointed to dispose of the immovable property, pay all debts in respect of the property, including inter alia all amounts owing in respect of the mortgage bond registered over the property and to distribute the net proceeds accruing from the sale of the property equally between the parties;

(d ) in respect of Rule 43 costs that were reserved, the appellant is entitled to those costs;

(e) the interim order of Van Oosten J is discharged with costs;

(f) contempt of court proceedings, the appellant to pay the costs;

(g) and the respondent to pay the costs relating to his rectification application.

[2]. Leave to appeal is sought against the following orders:

2.1. the appellant is ordered to make accrual payment to the respondent in the amount of R267 510 together with interest thereon at 15.5% from date of judgment to date of final payment

2.2. the appellant to pay the respondent's costs;

2.3. the interim order of Van Oosten J is discharged with costs.

[3]. The respondent opposes the application for leave to appeal

[4]. In the application for leave to appeal, the appellant must show there is reasonable prospects of success .This means that there must be a reasonable prospect of another court may come to a different conclusion.

[5]. At the hearing of this application for leave to appeal, the ground of appeal directed to order (c) above was abandoned.

[6]. Although in the application for leave the applicant advanced a number of grounds on which leave is sought, at the hearing hereof only two grounds were persisted with.

[7]. The first ground related to the amount of R 2 691 691 which respondent's expert witness said must be deducted from gross value of R 7 636 688 as tax payable on that amount. The evidence established that the amount of R7 636 688 was converted by the respondent from a Pension Preservation Plan into a Living Annuity. It was argued by Cohen SC on behalf of the applicant that I should not have ignored the evidence of Mr Gallizio, Mr Nagle's evidence under cross-examination and the respondent testimony which was to the effect that no tax is paid when the conversion of cash asset into Living Annuity occurred. He accordingly submitted that that I erred in allowing an amount of R2 062 043 to be deducted. He argued that had I not deducted the amount concerned, the accrual amount of the estate of the respondent would have been R 3 632 940 which means that the respondent's estate would have exceeded the applicant's estate by R 3 632 940 with the result that the respondent would have been liable to pay the applicant an amount of R 1 816 470.

[11]. Mr Gallizio's evidence was to the following effect;

(a). that when the respondent converted this Preservation Pension Plan in the amount of R 7 636 688 into a Living Annuity, tax was not payable. The respondent will pay tax on the monthly income received.

(b). SARS will tax the respondent on his monthly annuity that he is getting.

[12]. I have accepted Mr Gallizio's testimony and his testimony was unchallenged.

[13]. The respondent's testimony is that when he did the conversion of the aforesaid amount into a Living Annuity, he did not pay tax.

[14]. Mr Nagle's testimony in essence was the following;

(a). That when the respondent converted a Preservation Pension Fund of R 7 636 688 into a Living Annuity, not tax was paid. He elaborated that when the respondent draws down his annuity, he receives a net amount and tax is triggered.

[15]. I accepted Mr Nagle's evidence which in my view was logical and based on sound conclusion. In my view provision for tax should be made in determining the net value of the estate because it is a liability which the respondent would have to meet from his estate.

[16]. For reasons stated above and in my judgment this ground of appeal must fail.

[17] Secondly, that I erred in discharging the interim order of Van Oosten J with costs. It was submitted that my factual conclusion is wrong in finding that the respondent was entitled to handle his financial affairs in the manner in which he did.

[18]. This ground of appeal falls to be dismissed because the purpose of Van Oosten J's order was to preserve the status quo pending finalisation of the divorce proceedings. When the divorce order was granted, the reason for the interim order ceased to exist.

[19]. For these reasons, application for leave to appeal is dismissed with costs.

The Order

[20. I make the following order:

1. The application for leave to appeal is dismissed with costs

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T.D. VILAKAZI

ACTING JUDGE OF THE HIGH COURT

DATE HEARD : 29 JULY 2016

JUDGMENT DELIVERED : 22 SEPTEMBER 2016

COUNSEL FOR THE PLAINTIFF : COHEN SC

INSTRUCTED BY : MYERS INCORPORATED

COUNSEL FOR THE DEFENDANT : ZIMMERMAN

INSTRUCTED BY : TAITZ & SKIKNE ATTORNEYS