

SOUTH AFRICA / JUDGMENT

Bekker v F.J.L.R and Another (1445/2020) [2025] ZAMPMHC 19 (27 January 2025)

[2025] ZAMPMHC 19

COURT

Middelburg High Court, Mpumalanga

BEFORE

Langa

CASE / FILE NUMBER

1445/2020

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IN THE HIGH COURT OF

SOUTH AFRICA

MPUMALANGA

DIVISION (MIDDELBURG LOCAL SEAT)

CASE NO: 1445/2020

(1)

REPORTABLE: NO

(2) OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

DATE 27/01/2025

SIGNATURE

In

the matter between: MARTHINUS JACOBUS
BEKKER
APPLICANT
And
F[...]
J[...] L[...] R[...]
FIRST RESPONDENT
N[...]
L[...] R[...]
SECOND RESPONDENT

JUDGMENT

Coram: Langa J

Introduction and Concise Facts

- [1] The Applicant in this matter Mr MJ Bekker is applying for an order compelling the Respondents Mr FJ L[...] R[...] and Ms N L[...] R[...] to make a payment of the amount of R531 521.26 for the professional fees in claimed by the Applicant in respect of the calculation of the accrual of the Respondents' respective estates after their divorce. He also seeks a declaratory order that he does not have the duty in terms of the order or mandate to divide the Respondents' assets.
- [2] Both Respondents oppose the application, and the thrust of their attack is not dissimilar. The First Respondent in essence questions whether the Applicant has in fact preformed all the obligations in terms of the order of court dated 18 February 2018 ("the Divorce order") and avers that he Applicant did not perform all the obligations as ordered. He contends further in the alternative that should it be found that he did, the First Respondent questions the correctness of the calculation of the professional fees so claimed. Likewise, the Second Respondent raises the question whether the Applicant generally executed his mandate and also questions the taxation of his fees.
- [3] The matter revolves around the divorce order by the regional court dated 6 November 2014. The First and Second Respondents were married to each other out of community of property with the inclusion of the accrual system. They were however separated during 2010 and subsequently finally divorced on 6 February 2014. Although their decree of divorce incorporated a settlement agreement, they however could not reach an agreement on the division of the accrual. This necessitated the appointment of a liquidator, and the Applicant was accordingly appointed as such and the 13 February 2018. Pursuant to this appointment and after the provisional liquidation and allocation account, he compiled and submitted a final report after.

Common cause issues

[4] It is common cause that the Liquidator rendered professional services for which he is entitled to receive reasonable remuneration. The Respondents in fact concede that the Applicant is entitled to payment but contend that the actual work performed was not in accordance with the scope initially agreed upon by the parties.

[5] It is further common cause that the Applicant was appointed as liquidator in terms of a Regional Court order which states inter alia the following:

5.1 . "Marthinus Jacobus Bekker is hereby appointed as Liquidator...to determine the amount equal to half of the difference between the accrual in the respective estates of the parties and to determine which party is entitled to receive payment from the other in respect of the accrual, to prepare a final account...and to divide the assets of the accrued estates in accordance with the account " (My underlining)

5.2 "The Liquidator is obliged to determine any accrual in the estates of the parties and to ensure that such payment is made."

5.3 "(T)he Liquidator shall (after finalisation of the account)

proceed to finalise the division of the accrual in accordance with the said account "

Issues in dispute

[6] As alluded to above, there are two main issues in disputes which are whether the Applicant performed all his obligations in terms of the divorce order dated 18 February 2018 and whether the fees claimed represent an accurate calculation of all the work done.

The Applicant's contentions

[7] The Applicant contends in the main that he duly complied with his duties and calculated the accrual and issued a report together with his findings and recommendations. He also issued his account totalling R531 991.27 which the Respondents had 14 (fourteen days) to object to otherwise it would become binding. He contends that the First Respondent stated that he was objecting to the findings concerning the division without advancing reasons. The Second Respondent on the other hand accepted the account and the findings in writing.

[8] The Applicant maintains that he is entitled to payment from the Respondents in terms of the mandate and fees as detailed and recorded in Annexures "C" and "D". Lastly the Applicant contends that his duties in terms of Annexure "D" do not include the physical division of the joint estate and that the Respondents are not disputing the Applicants fees on bona fide grounds.

The Respondents Contentions

[9] The First Respondent's contentions is that the Applicant failed to discuss the report with him and also failed to physically divide the joint estate. He argues that the Applicant is therefore not functus officio and accordingly not entitled to any payment. The Second Respondent on the other hand contends that the Applicant is not entitled to payment as she (the Second

Respondent) has not received her payment of the accrual in terms of the order. She further argues that the Applicant had the duty to ensure that she received her payment from the First Respondent.

Discussions and

analysis

[10] It is clear from the above that the issue to be determined is what the scope of the Applicant's mandate was and whether he has complied with his duties in terms thereof and accordingly entitled to the fees claimed. In order to determine the scope of the mandate and the duties it is necessary to examine Annexure "D" which sets out the details of the liquidator's duties.

Annexure A

10.1 The powers and duties of a liquidator are set out in Annexure A. Of importance to this matter is the right remuneration and the duties of the Liquidator. The terms of paragraphs 1 and 3 are almost the same as can be seen below.

10.2 Paragraph 1 states that the Applicant is appointed as Liquidator in the Respondents' accrued estates to determine any accrual in the estates of the parties, to determine the amount equal to half of the difference between the accrual in the respective estates of the parties and to determine which party is entitled to receive payment from the other in respect of the accrual, to prepare a final account between the Applicant and Respondent (sic), and divide the assets of the accrued estates in accordance with the account. (my underlining).

10.3 Clause 3 repeats what is in clause 1 and provides that "the Liquidator is obliged to determine any accrual in the estates of the parties, to determine the amount equal to half of the difference between the accrual in the respective estates of the parties and to determine which party is entitled to receive payment from the other in respect of the accrual and to ensure that such payment is made.

10.4 Clause 2.17 provides that the Liquidator will be entitled to the remuneration and commission applicable to a trustee, appointed in terms of the provisions of the Insolvency Act 24 of 1936 as amended. (my underlining)

[11] As correctly argued by the First Respondent, where the terms of the order are ambiguous, the principles of interpretation as espoused in many court cases are applicable. The following often quoted passage in the seminal case of *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) is worth repeating here.

"Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to

insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. See also Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 304D-H)

- [12] As stated above at the heart of this dispute are the duties of the Liquidator as well as the reasonable fees he is entitled to. As correctly pointed out by the Applicant, the terms of Annexure A are in my view not ambiguous regarding his duties as the Liquidator. It is clear in terms of the appointment letter that the Liquidator is obliged inter alia to divide the assets of the accrued estates in accordance with the account. In addition to determining accrual in the estates of the respective parties and the amount equal to half of the difference between the accrual in the respective estates of the parties, he is also obliged to determine which party is entitled to receive payment from the other in respect of the accrual and to ensure that such payment is made.
- [13] In the report, the Applicant seems to be interpreting the duties as understood by the Respondents. For instance, in the report dated 11 November 2019 the Applicant states inter alia the following which confirms the duties as set out in the appointment letter:

"To summarise my mandate, the Order mandates me to determine the accrual in the Estates of the Parties, determine the amount equal to half of the difference between the accrual in the respective estates of the parties, and to determine which Party is entitled to receive payment from the other Party in respect of the accrual, and to divide the assets of the accrued Estates in accordance with the Account. "

At page 16 of the report, he states the following:

"The Liquidator is further mandated in terms of the Order attached hereto, marked Annexure "C", to divide the assets of the accrued Estates in accordance with the account. I understand this portion of the Order read with Paragraph 2.9 of the Order, to mandate and empower the Liquidator to distribute and allocate the assets of the respective accrued

Estates so as to give effect and in essence make payment of the amount due from the Estate of Mr FJ L[...] R[...], to the Estate of Me. N[...] L[...] R[...]."

At page 17 he states further as follows:

"Mr L[...] R[...] is however given the opportunity, as this is a Provisional Report, indicate if he rather wants to make payment of the amount due to Me. N[...] L[...] R[...], when and how such payment will be made. If Mr. F.J. L[...] R[...]'S proposals are acceptable to all parties, it will not be necessary for the Liquidator to sell or award in specie, his assets as contemplated above. "

Lastly, at page 18 of the report he states as follows:

"The only aspect then still needs to be addressed, is to finalise the process explained above, to possibly divide the assets of the accrued Estates in accordance with the Account, so in other words, to possibly sell to be able to make payment or award assets in specie to Me. N[...] L[...] R[...], to effect payment of the amount owing to her in terms of the Account."

- [14] In his founding affidavit the Applicant states that he complied with the court order dated 13 February 2028 by filing his report. He further contends that the report and account became final on 13 December 2019 after the First Respondent failed to raise any valid objections and the Second Respondent accepted the report. He argues therefore that once the report was confirmed he became functus officio and the Second Respondent obtained the right of recourse against the First Respondent.
- [15] He states further that in his letter dated 13 December 2019 he informed the Respondents that he received legal advice that "the Liquidator cannot now attend to award assets . Ms N[...] L[...] R[...] acquired a right of claim against Mr FJ L[...] R[...], for the amount that is due to her, in terms of the account that had become final, and has been confirmed in terms of Clause 5.3 of the Court Order, as mentioned above". The impression created here is that as the Second Respondent has a acquired a right to claim against the First Respondent, the Applicant is not obliged to attend to the division of the assets.
- [16] However, in his replying affidavit the Applicant avers that although the court order states that he must divide the assets in accordance with the report, the court did not give him the powers to do so. The Applicant contends that the provision in the order that he is empowered to distribute and allocate movable assets is not sufficient to divide assets. He further concedes in paragraph 2.5 of the replying affidavit that it is for this reason that he is unable to divide the assets as suggested by the First Respondent. It is notable that this reason is not specifically mentioned at all in the in the founding affidavit or the letter dated 13 December 2019 referred to in the preceding paragraph.
- [17] Contrary to his assertions in the founding affidavit it is now clear from the replying affidavit that the Applicant now admits he did not complete his mandate as he did not divide the assets in accordance with the account. Despite this concession it is clear that the Applicant did not take any measures to ensure that he could complete his mandate.
- [18] I am however of the view that if the Applicant genuinely believed that he did not have sufficient powers to execute his mandate, instead of declaring himself functus officio, the Applicant could and should have obtained a variation order extending his powers. Instead, he declared himself functus officio and demanded payment from the Respondents for the full work performed as envisaged and set out in his report as if he performed all that work.

- [19] That a receiver can ask for the variation of his powers was confirmed by the full bench of the Eastern Cape High Court in *Nkanjeni v Paterson* [2019] ZAECHC 70 which held that a receiver is an officer of court is appointed to effect the division on the Court's behalf. It held that "There can accordingly be no basis to suggest that a duly appointed receiver does not enjoy the necessary locus standi to approach the court which appointed him/her to obtain directions regarding the exercise of his/her powers."
- [20] In the light of the above I am not persuaded that the assertion by the Applicant that there were deficiencies in the court order constitutes a good reason to absolve the Applicant from his unambiguous mandate in terms of the court order. Even if this court were to indorse the Applicant's assertion that the application be granted because the Respondents did not object timeously or at all to the report, the Applicant in my view clearly did not complete his mandate in terms of the court order in full.
- [21] Furthermore, the Applicant's assertion that the order does not provide that he must divide the estate is in my opinion also incorrect and cannot be sustained. As stated in the preceding paragraphs he unambiguously conceded in his report several times that he was ordered to divide the assets of the accrued estates in accord with the account. He further conceded that he was ordered to ensure that the necessary payment is made after the determination of the accrual. The Applicant cannot now argue that the order does not give him powers to physically divide the assets. The argument that dividing is not the same as allocating/distributing is a pedantic one and does not take the matter anywhere. What is clear is that the Applicant did not divide the estate in line with the order and did not ensure that payment is made to the Second Respondent in line with the order. It therefore cannot be accepted that he fully performed in terms of the order. Consequently, he cannot be entitled to full payment as if he had completed his mandate in full.
- [22] Notwithstanding the above findings, I find that the First Respondent's contention that the Applicant's case should be dismissed is not flawed. I am not persuaded that it would be a fair result particularly considering that it is not disputed that the Applicant has performed some work in terms of the order. In fact, the First Respondent in his heads of argument states explicitly that "nobody is contending that the Liquidator should not receive reasonable remuneration for professional services". Consequently, while I find that he is not entitled to the fees he would have been entitled to had he completed the mandate, I am nevertheless satisfied that the Applicant is still entitled to reasonable remuneration for actual work done.
- [23] Concerning what order to make in this matter, one has to consider that as it is now common cause, the Respondents have in due course managed, after litigation, to finalise the division of the estate which the Applicant ought to have done in terms of the order. It will therefore not be practical to order the Applicant to complete his mandate by dividing the assets and paying what is due to the Second Respondent to her. That issue is now therefore moot.

- [24] There, however, obviously remains a dispute in respect of the amount which the Applicant is entitled to as reasonable fees for his services. This in my view constitutes a dispute which cannot be resolved on the papers by this court. The question is how to resolve this dispute. Referring the matter to trial would not be a practical cost effective measure to resolve the matter.
- [25] It is apparent from paragraph 2.17 of the letter of appointment of the Applicant as Liquidator that he is entitled to remuneration and commission applicable to a trustee, appointed in terms of the provisions of the Insolvency Act, 24 of 1936, as amended. Likewise, in terms of paragraph 2.8 he is accorded the same rights as such a trustee appointed in terms of the same Act.
- [26] The Second Respondent contends that the Applicant's fees are susceptible to taxation and that the Insolvency Act provides for taxation thereof. The Applicant contends that his account is not susceptible to taxation as the Respondent failed to object to the account within 14 days as provided in the agreement. He also argues that this is not an insolvency matter where assets have to be liquidated, and the proceeds be divided between the parties.
- [27] I am not persuaded by the Applicant's argument that this matter, and particularly the contention that his remuneration falls beyond the purview of the Taxing Master for the reasons advanced. The issue of the Respondent's failure to object timeously to the report and account is irrelevant as the court essentially accepts that the Applicant is entitled to payment for his fees. The only issue is how much he is entitled to considering the finding that he did not perform fully in terms of the mandate.
- [28] Section 63 (1) of the Insolvency Act 24 of 1936 provides as follows in respect of the remuneration of trustee or curator bonis:
- (1) Every trustee or curator bonis shall be entitled to a reasonable remuneration for his services, to be taxed by the Master according to tariff B in the Second Schedule to this Act: Provided that the Master may, for good cause, reduce or increase his remuneration, or may disallow his remuneration either wholly or in part on account of any failure of or delay in the discharge of his duties or on account of any improper performance of his duties.
- [29] It is clear from the correct interpretation of paragraphs 2.8 and 2.17 of the appointment letter read with section 63 (1) above that the parties intended the remuneration of the Applicant as Liquidator to fall within the ambit of the Taxing Master. I am accordingly of the view that an order that the Applicant's reasonable fees be taxed by the Master will be an appropriate order in this matter. The process by the Master will also deal with the issue of the correct and applicable tariff. Consequently, an appropriate and fair order to make is to grant the application for the payment of the amount for reasonable fees as would be determined by the Master.

Declaratory relief

[30] Regarding the declaratory relief, the relief sought by the Applicant was essentially that the Respondents be compelled to sign an addendum to enable him, the Applicant, to then physically attend to the division of the assets. It is however now common cause now that this has become moot considering that the issues between the parties have already been resolved by the settlement of the issues between them. It is accordingly no longer necessary to consider this issue as the Applicant also submits.

Costs

[31] Concerning the costs, the general rule is that a successful party is entitled to costs. I do not find any reason in this matter to deviate from this rule. The Respondents have in essence succeeded in resisting the application in that they have established that the Applicant is not entitled to the full amount claimed and that he did not complete his mandate. lost as the court dismissed their contention that the Applicant is not entitled to costs. It was clear from the onset that the Respondent conceded that the Applicant was entitled to costs but only disputed the costs claimed. I am however not in swayed that the circumstances warrant a punitive costs order. As was stated in *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and Another* 2020 (4) SA 409 (CC), costs on an attorney-client scale is an extraordinary order which will be imposed only in exceptional circumstances. Instead, I am of the view that an order for a party and party costs on Scale B would suffice and that is the order I intend to make.

[32] In the result I make the following order:

1. The application is dismissed to the extent that the Applicant claims full amount of fees;
2. The matter is referred to the Master for the determination of the reasonable fees and taxation of the fees in terms of section 63(1) of the Insolvency Act 24 of 1936 as amended;
3. The Applicant to pay the party and party costs of the application on Scale B in terms of Rule 67A.

MBG LANGA

JUDGE OF THE HIGH COURT

MIDDELBURG

Appearances

For the Applicant: Advocate MP Van der Merwe For the First Respondent: Advocate H Scholtz

Date of hearing: 10 October 2024 Date of judgment: 27 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be the 27 January 2025 at 15h30.

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