

SOUTH AFRICA / JUDGMENT

Brouwer NO v Van Heerden and Others (62130/2014) [2019] ZAGPPHC 267 (27 June 2019)

[2019] ZAGPPHC 267

COURT

North Gauteng High Court, Pretoria

BEFORE

Louw

CASE / FILE NUMBER

62130/2014

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IN THE HIGH COURT OF THE
REPUBLIC OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
(1)

REPPORTABLE: YES/NO
(2)
OF
INTEREST TO OTHER JUDGES: YES/NO
(3)
REVISED
CASE NO: 62130/2014
27/6/2019
In

the matter between: JOHAN
BOUWER N.O.
Applicant
and
MIRANDA
VAN HEERDEN
First Respondent
QUERIDE
JANSE VAN VUUREN
Second Respondent
QUINTELEN
VAN HEERDEN
Third Respondent
LINDA

MIFANWY VAN HEERDEN N.O.
Fourth
Respondent
LINDA
MIFANWY VAN HEERDEN
Fifth Respondent

JUDGMENT

LOUW, J

- [1] The first respondent was previously married in community of property to Mr. Petrus Arnoldus Van Heerden . Their marriage was dissolved by order of this court on 30 August 2016. The divorce order incorporated a settlement agreement in terms whereof it was agreed that their joint estate would be divided equally between them. The settlement agreement recorded that the parties could not agree on the value of the joint estate and that the applicant be appointed as referee to determine the value of the joint estate and then to divide it equally between the parties. The applicant is a registered professional forensic accountant. The settlement agreement provides that he shall have the powers set out in an annexure thereto, referred to as "Aanhangsel 1".
- [2] The joint estate includes the following assets:
- A small citrus farm near Brits on which the parties conducted a business known as Harley 's Family Restaurant and Accommodation. A workshop/storage facility was rented out until recently. A variety of citrus fruits are produced on the property and the joint estate also derived an income from a billboard on the premises.
 - Two houses, one in Rustenburg and one in Hartbeespoort, that are rented out.
 - Numerous movable items such as vehicles, furniture, equipment and farming implements.
- [3] The applicant attempted to negotiate a settlement between the parties. Initially, the idea was to include the assets of the Q2 Trust in which the parties and their two daughters, the second and third respondent s, were the beneficiaries. No agreement could be reached on the value of the trust assets and it was then decided to exclude the trust assets. A problem then arose that it could not be established what the amount of the loan account of the joint estate in the trust was. It appeared that the auditors of the trust would have to redo the financial statements of the trust for a period of about 10 years in order to reflect the loan account in the trust's financial statements.
- [4] By June 2017, it became clear that the auditors would not be able to produce a new set of financial statements for the trust as they were unable to obtain the required information from the parties. Negotiations between the parties continued through the medium of the applicant on the basis of certain valuations provided by Mr. Van Heerden. On 11 September

2017, the applicant prepared a document titled "Composition and Value of Estate ". This was the fourth such document which the applicant produced, each time giving the parties the opportunity to discuss the content with their attorneys and to give him feedback. Mr. Van Heerden responded to the third document, dated 21 July 2017, stating that if his proposals would be worked into the document he would accept it. Furthermore, that if the first respondent would accept the document and agree on a division of the joint estate on the basis thereof, then he would put the farm up for sale, together with the businesses conducted thereon, so that the proceeds thereof could be divided between them. He further proposed a value for the loan accounts against the trust in the amount of R2,51 million.

- [5] Mr. Van Heerden's response to the third document caused the applicant to prepare the fourth document dated 11 September 2017 . On 21 September 2017, Mr. Van Heerden informed the applicant that he accepted the document. The first respondent, however, was not prepared to accept it. She, instead, proposed that all the assets of the joint estate should be sold.
- [6] On 10 November 2017, the applicant telephoned Mr. Van Heerden in order to obtain a comprehensive settlement offer from him which could obviate the need to resolve all disputes between the parties. What gave rise to the telephone call was that it appeared that Mr. Van Heerden was to be hospitalised and to undergo a serious operation on 12 November 2017. On the same day, Mr. Van Heerden sent an email to the applicant in which he objected to the urgent request so shortly before his operation. He nevertheless proceeded to furnish some information and a proposal, with some motivation, referring inter alia to discussions between him and the first respondent in respect of certain assets. The next day, 11 November 2017, Mr. Van Heerden addressed a further email to the applicant in which he requested the applicant to hold over the division of the joint estate until he made contact with the applicant after his operation.
- [7] It subsequently appeared that Mr. Van Heerden was undergoing treatment for cancer, that his prognosis was not good and that he did not want to spend his last days attending to the division of the joint estate. He eventually passed away on 7 April 2018 without having made any further attempt to take the division of the joint estate forward.
- [8] Mr. Van Heerden married the fifth respondent the day before he died. In terms of his last will, a Mr. Austin, an insurance broker, was appointed as executor of the deceased estate. The fifth respondent was appointed as trustee of the Q2 trust in the place of the deceased.
- [9] Mr. Austin declined his appointment as executor of the estate. The Master thereafter, on 17 May 2018, appointed the fifth respondent as executor of the estate. She is cited in that capacity as the fourth respondent.

[10] The relationship between the first respondent and the fifth respondent has been strained all along. The fifth respondent lived with the deceased since 2 May 2014 when the deceased left the common home in Buffelspoort Eco Park, a property which belongs to the trust, and moved to the farm.

[11] On 20 June 2018, the fifth respondent's attorney in Plettenberg Bay, Mr. du Plessis, wrote a letter to the applicant in which it was suggested that the applicant should obtain the signature of the first respondent to the settlement agreement proposed by the deceased before his operation in November 2017. The letter stated that in the absence of such, the applicant would be obliged to refer this matter back to court. It was further proposed in the letter that a round table meeting should be held in order to avoid litigation that would ensue for many years to come and which would not be to the benefit of anyone concerned. The letter ended off

with a threat that an urgent application would be launched by the fifth respondent if such a round table meeting did not eventuate.

[12] The applicant thereupon requested the first respondent's attorney, Mr. Wagenaar, to arrange a round table meeting between all the parties as proposed by Mr. du Plessis. Mr. Wagenaar took this up with Mr. du Plessis who agreed that it was urgent to do so, but first wanted to go away for a few days. Mr. Wagenaar proposed that the meeting be held before 6 July 2018, the date on which Mr. du Plessis intended to depart and offered to travel to Mr. du Plessis in Plettenberg Bay with the applicant. Mr. du Plessis responded by emailed letter on 5 July 2018, stating the following:

"We have noted the contents of your emails and wish to go as far as to say that we are both ad idem that the division of the joint estate is paramount and of the utmost importance to all parties concerned. Any urgent application should in fact be, requesting the court's assistance for such division in terms of the order of divorce. If Mr. Bouwer is of the opinion that he is not in a position to finalise the values and division of the assets of the joint estate the court should be requested to assist on an urgent basis."

The following is also stated in the letter:

"Having said all of the above we agree that a roundtable meeting should be convened. It is imperative that Mr. Bouwer, our respective clients and legal representatives be present. If solutions and finalization of the (a) values of the assets and (b) the distribution thereof cannot be agreed upon, your suggestion regarding the liquidation of the estate would be a possible solution."

Towards the end of the letter, Mr. du Plessis stated that upon his return to office on 17 July 2018, he would immediately make the necessary arrangements with Mr. Wagenaar, the applicant and his client to schedule a round table meeting.

[13] On 12 July 2018, Mr. Wagenaar directed an email to Mr. du Plessis in which he suggested three dates on which a round table meeting could take place after Mr. du Plessis' return from holiday. On 18 July 2018, Mr. Wagenaar had a telephonic discussion with Mr. du Plessis who indicated that he would soon inform Mr. Wagenaar regarding his availability for such a

meeting. When no response was received by 23 July 2018, Mr. Wagenaar sent a further email requesting Mr. du Plessis to provide some dates on which he would be available. There was never a response to this request.

- [14] On 2 August 2018, the applicant directed a letter to the fourth respondent in respect of certain expenses that were incurred in the business and had not yet been settled by the business. On 3 August 2018, the applicant sent a further email to the fourth respondent in which he emphasised that, to date, no financial information or reports of the business had been received from her as requested more than two months before. The applicant stated that, for this reason, he could not determine any value of the business, do any

proposal to potential buyers or do a cash flow projection for the current running of the business. He reprimanded her for being

obstructive and urged her to handle all further matters in a professional way within her mandate.

- [15] On 24 August 2018, the applicant sent an email to the fourth respondent in respect of the Toyota bakkie which had been used on the farm but which the applicant had removed without his consent. The applicant had been informed by the first respondent that the bakkie had been used for years on the farm and formed an asset of the joint estate. On 27 August 2018, the fourth respondent replied that the bakkie was in her possession and would be sold and the proceeds deposited into the account of the deceased estate. In her letter, the fourth respondent demanded the handing over to her of the spare keys of the bakkie and four other vehicles. Two of these are two motorcycles which belong to the Q2 trust. The other two vehicles belong to the joint estate.

- [16] On 31 August 2018, the applicant's attorney addressed a letter to Mr. du Plessis in which it was stated that, in order for the sale of the business to be undertaken, it was necessary for the applicant to properly evaluate the current value of the business and to draft a forecast of the business which can be supplied to prospective purchases. In order for the applicant to undertake the exercise, it was stated that it was vital that the applicant be supplied with the following documentation and information for at least the last three years which the fourth respondent may have in her possession: signed financial statements and, if not available, any draft financial statements; ledgers of the business; bank statements; lists of both creditors and debtors, including balances and ledgers; salaries; VAT reconciliations; income tax e-filing login credentials; and all contracts and commitments which have been concluded in the name of the business. The documents and information requested were not provided by the fourth respondent.

- [17] The applicant thereafter concluded that the fourth respondent was not prepared to co-operate. He accordingly decided to launch the present application in terms whereof he seeks an order that the fourth respondent be ordered to furnish to the applicant the information as requested from her in the letter of 31 August 2018; that the fourth respondent be ordered to return the Toyota bakkie to the applicant at the Harley's business; and that the applicant's powers be extended by the court by authorising the sale of all the assets of the

joint estate so that an equal division of the joint estate can be achieved. The application is supported by the first respondent, but is opposed by the fourth and fifth respondents. The fourth and fifth respondents have also filed a counter application for an order that the applicant be removed as referee in respect of the division of the joint estate of the first respondent and the deceased, and for ancillary relief.

- [18] The fourth and fifth respondents oppose the application on a number of legal grounds rather than on factual issues. The first is that the applicant's application for the extension of his powers as referee is fatally flawed as same has been instituted absent the jurisdictional requirement prescribed in clause 1.15 of "Aanhangsel 1" to the deed of settlement. Clause 1.15 reads as follows:

"Om in die afwesigheid van 'n ooreenkoms tussen die partye die Agbare Hof te nader, behoorlik verteenwoordig, om enige verdere magte bekom wat nodig mag wees om die Skeidsregter in staat te stel om sy magte en pligte na behore uit te oefen."

- [19] The argument is that there is no allegation by the applicant that he had approached the parties to agree to the extension of his powers as envisaged in clause 1.15 and that one or both had refused to agree thereto. There is, however, no requirement in clause 1.15 that the applicant must first approach the parties to agree to the extension of his powers before he may approach the court. Factually, there is no agreement between the parties to extend the applicant's powers. The fact that the fourth and fifth respondents oppose the application for extension of the applicant's powers is a clear indication that no agreement in respect thereof would, in any event, have been reached. Clause 1.15 must be interpreted in the context of the whole document. The following clauses which also deal with the applicant's powers are significant :

"1.14 Om enige aksie te neem en uit te voer welke die Skeidsregter in sy alleen diskresie mag ag noodsaaklik te wees vir doeleindes daarvan om effek te gee aan sy mandaat.

1.17 Om behoorlik oorweging te skenk aan die wense van die partye, en om sodanige beslissings en besluite te maak daaroor as wat hy mag goed ag.

7. Sou die partye nie op die waaarde en/ of verdeling daarvan kan ooreenkom nie, sal die kwessie waarop die partye nie kan ooreenkom

nie, na die Agbare Hof verwys word vir finale beregting."

- [20] In my view, clause 15.1, properly interpreted and in context of the document as a whole, does afford the applicant the right, in the absence of an agreement between the parties, to approach the court for an extension of his powers in order to give effect to his mandate.

[21] It was submitted in the alternative on behalf of the applicant, with reference to various authorities, that the court has the inherent power to make appropriate orders in respect of how a joint estate should be dealt with in order to divide it between the co-owners thereof. Of particular assistance is the judgment of Van Zyl J in *Revill v Revill*[1] in which the court referred with approval to the following dictum by Rose-Innes CJ in the case of *Gillingham v Gillingham*[2]:

"When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which the Court has to appoint curators it may nominate and empower some one (whether he is called liquidator, receiver, or curator - perhaps curator is the better word) to collect, realise and divide the estate."

[22] If the court has the power to appoint a person to effect the division of the joint estate on its behalf, it obviously also has the power to determine the manner in which such person shall effect the division. The applicant's alternative argument is therefore correct.

[23] It was submitted on behalf of the fourth and first respondents, with reference to the judgment of the Supreme Court of Appeal in *Morar NO v Akoo and Another*[3], that the court's power to extend the powers of the applicant is restricted. Reference was made to paragraph 19 of the judgment, but it is necessary to also quote paragraph 18:

"[18] When the court appoints a liquidator for a partnership it is remedying the failure of the partners to attend to the liquidation of the partnership by agreement. Such failure may arise from disagreement over the need to appoint a liquidator, or over the identity of the liquidator or over the powers that the liquidator should enjoy. That being so it is logical to take as one's starting point the powers that the partners could themselves confer by agreement, if they were not in a state of hostilities. The court is then asked to do no more than resolve a dispute between the partners over the appointment of the liquidator or over the liquidator's powers. It does so in a way that the parties themselves could have done. The disagreement arises in consequence of the one partner refusing to agree to the liquidator being appointed or the liquidator having a particular power and that can be characterised as a breach of the obligation of co-operation and good faith that are central to all partnerships. The court is then merely enforcing the contractual obligations of the partners themselves.

- [19] Once the court is asked to go beyond this it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which is not, must be observed and respected. In this case no such source was identified."
- [24] In the present matter, the court is not being asked to do more than resolving a dispute between the parties in a way which the parties themselves could have done. The Morar judgment therefore supports the applicant's submission that the court has the inherent power to extend the applicant's powers to selling all the assets of the joint estate, something which the parties could themselves have agreed upon.
- [25] Further grounds of opposition relied upon by the fourth and fifth respondents are that the extension of the applicant's powers as sought by the applicant is in conflict with the provisions of the rights afforded to the applicant in terms of "Aanhangsel 1" and that the terms of the applicant's appointment as a referee provide sufficiently for the applicant to have concluded
- the division of the joint estate, including the sale of assets to the extent allowed in terms of "Aanhangsel 1" and that the application for the extension of his powers is therefore totally unnecessary. It was accordingly submitted that the applicant has no locus standi to request the court to grant an extension of his powers.
- [26] The argument that the extension of powers sought by the applicant is in conflict with the provisions of the rights afforded to him in terms of "Aanhangsel 1" takes the matter nowhere. It is common cause that the terms of "Aanhangsel 1" do not permit the applicant to sell all the assets of the joint estate. It is therefore necessary for the applicant to apply to court to extend his powers to enable him to sell all the assets. He needs the authority of the court to exercise that power. I have found that the applicant is entitled to approach the court for an extension of his powers and that the court, in any event, has the inherent power to determine, in the absence of an agreement between the parties, the manner in which the joint estate should be dealt with in order to achieve an equal division.
- [27] It is clear from all the evidence that an equal division of the joint estate cannot be achieved by doing a valuation of all the assets. It will be an expensive exercise in futility as the parties are not able to agree on anything. It is common cause that the farm together with the Harley business must be sold as a going concern. The two Rustenburg properties have unequal values. Neither of the parties has shown any interest in retaining any of those properties or any of the movable assets. The only practical way of achieving an equal division of the joint estate is to sell all the assets and to divide the net proceeds equally between the first and the fourth respondents.

- [28] Prayer 1 of the applicant's notice of motion is for an order directing the fourth and fifth respondents to furnish to the applicant the information requested from her in terms of the letter of 31 August 2018. The fourth respondent expressly states in her answering affidavit that she has supplied the information requested from her by the applicant by means of emails dated 24 July 2018 and 9 July 2018 and that she does not have any of the documentation or information referred to in the 31 August 2018 letter. In terms of the Plascon-Evans" rule, her evidence in this regard has to be accepted. An order in terms of prayer 1 of the notice of motion can therefore not be granted.
- [29] In prayer 2 of the notice of motion, the applicant applies for an order directing the first respondent to return the Toyota bakkie to the applicant at the Harley's business. I was informed by counsel that the bakkie has in the meantime been sold by the fourth respondent and that it was not necessary to make any order in respect of the proceeds of the sale.
- [30] In prayer 4 of the notice of motion, the applicant seeks an order against the first respondent to pay a further amount to the applicant as a deposit to be held in trust from which payments can be made of expenses incurred or to be incurred in the execution of the applicant's mandate and of his remuneration as it becomes due from time to time. In prayer 5, the applicant applies for an order against the fourth respondent in her official capacity, alternatively in her personal capacity, to pay a similar deposit in an amount of R900 000.00 to the applicant's trust account. In prayer 6, the applicants seeks an order that the full costs of the present

application may be paid to the applicant from the deposit or any other receipts of funds from assets of the joint estate, subject to the right of any respondent to review the amount of such costs.

- [31] Clause 4 of "Aanhangsel 1" provides that the joint estate will be liable for the applicant's account on presentation thereof but that he will be entitled, at the final hearing of the action by the court, to request the court to make a suitable order in this regard. There is no provision that the applicant may require the first or fourth respondents to pay any deposit to him. What the applicant is entitled to claim is payment of his account from the joint estate on presentation thereof. I agree with counsel's submission that he can present his account for expenses incurred as and when they are incurred and that he does not have to wait until he has completed his mandate before claiming payment.
- [32] Counsel for the fourth and fifth respondents informed me during argument that he had been instructed that it would not be in the interest of the winding up of the joint estate that the applicant be removed as referee. The counter-application for his removal was accordingly withdrawn.
- [33] As to costs, Adv. Van der Merwe SC, who appeared for the applicant, submitted that the applicant's costs of the application should be paid by the joint estate. I agree. Mr. Wagenaar, who appeared for the first, second and third respondents, submitted that the fourth

respondent unilaterally took control of assets belonging to the joint estate. He referred in this regard to the Toyota bakkie and to the income from the billboard on the farm which was paid to the fourth respondent. He submitted that it would not be fair if the first respondent had to pay any costs as she would then have to pay to get her property back. He submitted that the costs of the application should be paid by the first respondent personally or from that portion of the joint estate to which she is entitled in her capacity as wife and heir of the deceased. In my view, the two instances mentioned by Mr. Wagenaar do not justify such a cost order to be made. I believe that the fairest cost order will be that the costs of all the parties be paid by the joint estate.

[34] In the result:

- (a) An order is granted in terms of prayer 3 of the notice of motion.
- (b) The applicant's costs of the application and the costs of the first, second, third, fourth and fifth respondents are to be paid by the joint estate of the first respondent and the late Mr. Petrus Arnoldus Van Heerden.
- (c) The fourth and fifth respondents are ordered to pay the costs of the counter-application jointly and severally.

Counsel for applicant: Adv. J L van der Merwe SC.

Instructed by: Martin Attorneys, Pretoria.

Attorney for 1st , 2nd and 3rd respondents: Mr. G Wagenaar
of Gerhard Wagenaar Attorneys, Pretoria.

Counsel for fourth and fifth respondents: Adv. D L van der Merwe.

Instructed by: HORS Attorneys Inc, Plettenberg Bay.

[1] 1969 (1) SA 325 (C)

[2] 1904 TS 609

[3] 2011 (6) SA 311 (SCA)

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Prepared on 12 October 2026 · Esheria