

SOUTH AFRICA / JUDGMENT

M.B.M v W.M.M (10751/2000) [2020] ZAGPPHC 155 (20 March 2020)

[2020] ZAGPPHC 155**COURT**

North Gauteng High Court, Pretoria

BEFORE

Van Staden

CASE / FILE NUMBER

10751/2000

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****(GAUTENG DIVISION,****PRETORIA)****(1)****REPORTABLE:**

YES/NO

(2)

OF

INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

Case number: 10751/2000

20/3/2020

In

the matter between:

MB

M[...]

APPLICANT

and

WM

M[...]

RESPONDENT

JUDGMENT

VAN STADEN, AJ:

INTRODUCTION

- [1] This matter concerns an application in terms of the provisions of Uniform Rule 42(1) for the variation of a divorce decree ordering the division of the parties' joint estate, almost 19 years after it was granted. The applicant seeks a variation of the divorce decree to provide for the sale, and division of the proceeds of immovable property, as well as certain relief in respect of the respondent's pension benefit, assets of the joint estate.
- [2] The parties were married in community of property. The issues in dispute are whether the applicant waived his ownership rights in respect of the assets of the joint estate and whether he is entitled to a variation of the divorce decree 19 years after it was granted.

FOUNDING AFFIDAVIT

- [3] The applicant and respondent were married to each other in community of property on 20 September 1995, and were divorced on 25 August 2000. The applicant was the plaintiff in the divorce action, which was not defended by the respondent. The divorce order simply reads that the marriage be dissolved and that the joint estate be divided.
- [4] The applicant lodged the current application on 6 May 2019. Therein he claims:

That the decree of divorce issued on the 25 August 2000 be hereby varied and include the following prayers:

- 1.1 That the immovable property of the joint estate at 1291 Ellsiras Ext 16, Lephalale, which is bonded to Standard Bank, be hereby valued by the professional valuator appointed by the Legal Practice Council within 30 days of the order.
- 1.2 After the valuation, the said immovable property be sold either through estate agent, alternative public auction, or private sale.
- 1.3 The costs of the valuation shall be paid by both parties in equal share, within 30 days of submission of the invoice.
- 1.4 After the immovable property is sold, the outstanding amount due to the Standard Bank for bond including any municipal rates and taxes first be settled.
- 1.5 Before any profit could be shared between the parties, any amount in which the other party was liable to contribute towards bond repayments as from September 2000, shall be deducted and reimbursed to the other party and the balance be shared accordingly.

1.6 The respondent/defendant is the member of the Government Employee Pension Fund in terms of section 7 (7) of the Divorce Act 70 of 1979 (as amended), respondent member interest in the said pension/or Provident fund forms part of the joint estate of the parties.

1.7 The applicant/plaintiff is entitled to 50% share of the respondent/defendant interest in the said fund as at date of divorce and the respondent/defendant pension fund/Provident fund is hereby directed to make such an endorsement on behalf of the applicant/plaintiff and pay the applicant/plaintiff within 60 days of decree of divorce.

- [5] The founding affidavit consists of some six pages of content (other than the heading and the commissioning provisions). According to the applicant the parties could for many years not reach some sort of agreement on dividing the joint estate. They do not see eye to eye and there is no chance of their resolving the division of the joint estate.
- [6] The applicant is not interested in any movable assets of the joint estate, and the respondent can keep them as her own assets. The only assets he wants to divide are the immovable property and the respondent's interest in the Government Employees Pension Fund (GEPF).
- [7] The applicant submits that it does not make financial sense to appoint somebody as liquidator of the joint estate, as the joint estate essentially consists of Erf 1291 Ellisras Ext 16, Lephalale (the immovable property). He also submits that it is necessary that the divorce decree be varied, to incorporate a specific clause dealing with the issue of the respondent's interest in the GEPF.
- [8] The applicant does not state what steps he undertook to achieve division of the joint estate in the intervening 19 years.

ANSWERING AFFIDAVIT

- [9] In her answering affidavit the respondent, a teacher, states that she has had no contact with the applicant since the granting of the divorce decree. She has not spoken to or seen the applicant since prior to the granting of the divorce decree.
- [10] Approximately two years prior to the granting of the divorce order, on 31 July 1998, the respondent purchased the immovable property which served as their joint home. The purchase price was R137,500.
- [11] The applicant, then employed by the South African National Defence Force, unsuccessfully applied for a home loan. After same had been declined, the respondent managed to obtain a home loan from Standard Bank. In accordance with the terms of the loan agreement the respondent was required to pay an amount of R2,793.62 per month until 22 February 2000, and thereafter pay a monthly amount of R 1,758.87. The total loan term was 250 months.

- [12] Every one of the 250 payments made in respect of the home loan was made by the respondent. The applicant never made any attempt to make any payment, nor did he assist the respondent in making any payment. The respondent accordingly denies that the applicant is entitled to any value in respect of the immovable property.
- [13] The respondent states that at the time of the granting of the decree of divorce, the immovable property was a liability, and not an asset. At 1 August 2000 the total amount owing in respect of the immovable property was an amount of R129,495.98. At date of granting of the divorce order the respondent had only made payment of the amount of R8,014.02 in respect of the home loan.
- [14] The respondent has over the course of the last 19 years made various improvements to the immovable property. For more than 19 years the applicant did not once contribute to the upkeep, maintenance, or improvements to the immovable property. This was all done by the respondent.
- [15] For all these years the respondent struggled to pay the bond, maintain the immovable property and pay the rates, taxes, water and electricity. Now 19 years later, when the bond is eventually repaid, the housing market in Lephalale is booming and the applicant wants to share in the immovable property. The respondent accuses the applicant of a lack of bona fides, of being “nothing more than a gold-digger”.
- [16] The respondent submits that an order as proposed by the applicant is unfair, in that it doesn’t take into account the costs she has incurred over the years. More importantly, the respondent contends, is that the applicant cannot now, 19 years later, wish to share in the value of the property. She contends that the joint estate no longer exists. She contends that the applicant is not entitled to a portion of the immovable property.
- [17] Effectively the respondent contends that due the applicant’s delay, in the face of the burdensome obligations she had to endure over the years, the joint estate ceased to exist and the applicant has waived his entitlement to share in the joint estate.
- [18] The respondent questions why the applicant specifically waited until she finished payment of the covering mortgage bond, to launch the application. She points out that the applicant fails to state why it has taken him 19 years to launch the application. She finds it very strange and coincidental that the applicant would wait until the “exact moment when the mortgage bond registered over the immovable property has been paid in full, to launch this application”.
- [19] The respondent denies that the applicant is entitled to claim 50% of her pension interest. At best, she says, the applicant is entitled to claim 50% of the respondent’s pension interest, calculated from date of marriage until date of divorce, in which instance the respondent wishes to claim 50% of the applicant’s pension interest too.

[20] The respondent avers that she is prejudiced as she has spent 20 years without the applicant, building her life, and now the applicant wants a share of it. For 20 years the applicant has not cared about the financial prejudice the respondent was suffering, paying for everything on her own. Now that the mortgage bond has been paid in full, the applicant suddenly appears and claims 50% of the value of the immovable property.

REPLYING AFFIDAVIT

[21] In reply the applicant concurs that the parties never communicated since prior to the granting of the decree of divorce.

[22] The applicant contends that where there is no forfeiture, the assets in the joint estate must be equally divided and that it was never the agreement that upon divorce, whoever was not paying the bond, would not be sharing in the immovable property. He contends that division of the joint estate is not dependent on the amount or level of his contribution and that the division of the joint estate does not expire.

[23] It is manifest that the applicant is alive to the respondent's claim of the applicant waiving his rights in respect of the joint estate.

[24] According to the applicant the fact that it is now 19 years later, does not bar him from demanding his share of the joint estate. He proposes that the amount he was supposed to contribute can simply be deducted from his share of the immovable property. The applicant only wants a 50% share of the respondent's pension interest until date of divorce and he agrees to similar relief in respect of his pension interest.

DISCUSSION OF THE MATTER

Introduction

to Discussion

[25] The respondent's representative was not present to argue the matter. As the respondent filed an answering affidavit, I take

cognisance of its contents, in deciding the matter.[1]

[26] The respondent claims that the joint estate no longer exists. Effectively she claims the applicant has abandoned or waived his ownership rights in respect of the joint estate, including the immovable property. I must accordingly consider such defence within the factual matrix of the case.

[27] During oral argument I raised with Mr Mello for the applicant the question whether the applicant has waived his ownership rights. I also requested the parties to submit supplementary heads of argument on whether the applicant has waived his ownership rights in respect of the assets of the joint estate in possession of the respondent. To the extent the applicant may contend that he was not alerted to the respondent's defence of

waiver of ownership rights in respect of the immovable property, and that he is prejudiced by my deciding the issue of waiver of the applicant's ownership rights in the joint estate as far as the assets in the respondent's possession are concerned, I am satisfied that there is no such prejudice.[2]

- [28] In response to my invitation for supplementary heads, the applicant submitted that he never expressed any desire to abandon his rights in respect of the joint estate. He also submitted that because of the court ordering division of the joint estate, his rights would in any event only be forfeited after 30 years, the period of prescription in respect of court orders. He submits that as 30 years have not expired, he has not forfeited his ownership rights in the joint estate.

Which facts?

- [29] In application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial. Where there is absent from the founding affidavit such facts as would be necessary for determination of an issue in the applicant's favour, an objection that it does not support the relief claimed is sound[3]. As stated in the *Swissborough* matter[4]:

"An applicant must accordingly raise the issues upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof."

- [30] Although the applicant states that the parties could for many years not reach some sort of agreement on dividing the joint estate, no particularity is furnished. The applicant furnishes no evidence of any interaction with the respondent in failing to reach some sort of agreement on dividing the joint estate. I am accordingly unable to grant any weight to his bald statement[5].

- [31] On the basis of the *Plascon Evans*[6] rule, I am to accept the respondent's version, that there was no interaction between the parties in the 19 years' time

period. Furthermore, in reply the applicant concedes that the parties did not communicate with each other.

Joint Ownership

- [32] The effect of a marriage in community of property is that the spouses become joint owners in the undivided half share of the assets

(including immovable property) they possess at the time of entering into the marriage, as well as the assets acquired by them during the subsistence of the marriage[7].

Waiver

[33] The respondent claims the joint estate has ceased to exist, and that the applicant is thus not entitled to division thereof. She effectively claims that the applicant has abandoned or waived his ownership rights in respect of the joint estate. Having also specifically raised the issue of waiver with the applicant, I accordingly consider such defence within the factual matrix of the case.

[34] The principles of waiver are described in the matter of *Laws v Rutherford*[8]:

“I proceed to consider whether... they establish the waiver relied upon. The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it. Waiver is a question of fact, depending on the circumstances. It is always difficult, and in this case especially difficult to establish.”

[35] The decision to abandon may be either express or tacit. Tacit abandonment is proved through the conduct of a party, with full knowledge of the right in question, being plainly inconsistent with an intention to enforce the right relied upon[9]. Whether or not conduct so proved is plainly inconsistent with the continuance of the right, would be a matter for inference by the court from the nature of the conduct proved[10].

[36] Delay in enforcing a right does not, in itself, amount to waiver[11]. In deciding whether waiver has been proved, a court takes into account that it is unusual for persons to give up rights or property

gratuitously, unless there is a reason for their conduct.[12]

[37] Ownership rights in respect of immovable property, like other rights, are capable of being waived or abandoned[13]. In fact, it is even possible to thwart an owner's vindication of his immovable property, by way of estoppel[14].

[38] The Roman Dutch author Van der Keessel[15] describes waiver of ownership rights as follows:

“door verlatinge. Dis uit die Romeinse reg oorbekend dat die eiendomsreg verlore gaan deur derelictio (tw) die ligaamlike feit van weggooi gepaard met die bedoeling om daardie saak nie meer as deel van 'n mens se goed te hê nie. En hierdie prysgewing kan hom voordoen nie alleen by roerende sake nie maar ook by onroerende, tensy daar miskien in die keure van besondere plekke 'n bepaling aangetref kan word om te verbied dat huise in die stad agv hulle vervallenheid prysgegee word.”

[39] In *Reck v Mills en 'n Ander*[16] the Roman Dutch underpinnings of waiver of ownership rights are dealt with as follows:

“Mills se bewering dat die skeepswraak van die Antipolis 'n res derelicta en derhalwe 'n res nullius was, was gemene saak. In hierdie verband is dit gewens om daarop te wys dat volgens ons gemene reg word eiendomsreg oor 'n saak deur derelictio verloor wanneer 'n eienaar sy saak prysgee of abandonneer met die bedoeling om nie meer eienaar daarvan te wees nie. Raadpleeg Inst 2.1.47; De Groot 2.1.52, 2.32.3; Vinnius ad Inst 2.1.46 nr1; Van Leeuwen CF 1.2.1.18, 1.2.3.14; Voet 41.1.10; Van der Keessel ad Gr 2.32.3. Sodanige saak is dan 'n res derelicta sonder 'n eienaar (res nullius).”

- [40] The question I must ask is whether the applicant’s conduct has been plainly inconsistent with an intention to enforce his rights[17]. This is especially difficult to establish in the context of a waiver of ownership rights in respect of immovable property[18].
- [41] The question is not whether the applicant has forfeited his joint ownership rights through prescription. Waiver and prescription are two different ways of forfeiting ownership rights in respect of immovable property[19]. Waiver of ownership rights in respect of immovable property is not dependent on prescription first being established.
- [42] Joint ownership involves more than one interested party, like praedial servitudes. It is therefore not inappropriate to consider the waiver of joint ownership rights in respect of immovable property in the context of authority on the waiver of praedial rights of servitudes. Dodson AJ in *Pickard v Stein*[20] deals extensively with the requirements of waiver in the context of praedial rights of servitudes:

“[49] ... Innes J in a minority judgment considered the question whether the servitude had been abandoned. This aspect of his judgment is

consistent with the approach of the majority. He said-

'The inquiry . . . is whether there has been on his part such acquiescence in the doings of things necessarily obstructive to the use of his servitude, as would justify the inference that he intended to abandon it. The reason why a servitude is destroyed by the toleration of matters inconsistent with its user is that the owner is held to have given it up. The ground of destruction is a tacit remissio (Voet, 8, 6, 5; Vinnius, Inst. II. 3, p. 194). And the well-known principle applies that an intention to waive rights of any kind is never

presumed. There must therefore be clear evidence not only of the owner's knowledge, but of his inaction for a sufficient time and

under effective circumstances. In *Edmeades v Scheepers* . . . which is the leading South African case on this question, the Court refused to enforce a servitude of grazing over land which to the knowledge of the plaintiff had been adversely enclosed for fifteen years. Now I do not mean to say that anything like that time would as a rule be necessary to establish a plea of tacit remission. Every case must depend upon its own circumstances. The nature of the servitude and the encroachment would of course be important elements.'

- [50] The most comprehensive survey of the old authorities on this point appears to be that conducted by Fannin J in his majority judgment in *Margate Estates Ltd v Urtel (Pty) Ltd*.

[51] Based on his survey, he identified two ways in which a servitude might be abandoned:

'In the first place . . . a servitude is lost by implied or tacit agreement if the dominant owner grants to the servient owner a right which conflicts with the right conferred by the servitude which, to use Voet's phrase, is "necessarily and naturally" obstructive of the servitude. In such a situation the dominant owner clearly abandons the obstructed right. . . . In this kind of situation the permission will usually be express, though, of course, it may be implied, in the same way as any other right can be waived by

"conduct by a person with full knowledge of his rights plainly inconsistent with an intention to enforce the right"

(Laws v Rutherford, 1924 AD 261 at p 263).

The second kind of situation . . . is one where the servient tenement does something in defiance of the rights conferred by the servitude and without any prior or contemporaneous permission, express or implied. In such a case a breach of the dominant owner's

rights clearly takes place, and he will normally be entitled to enforce compliance with the servitude by way of interdict or other

appropriate relief. But if he does not, or delays to, take action, there arises the question as to what will be the result of his

inaction. . . . [I]f the dominant owner stands by while the servient owner, without his permission, does some work or constructs some edifice or obstruction which, if completed, will "necessarily and naturally" obstruct the exercise of the servitude, he will not be allowed to enforce his rights by compelling the removal of the obstruction. . . . If the examples given by the authorities referred to mean anything, then for the dominant owner to lose his right to enforce the servitude three things must be present:

- (i) the doing of some work by the servient owner,
- (ii) knowledge on the part of the dominant owner, and
- (iii) inaction on his part until, it seems, the completion of the work, or of, at least, a significant part of it.'

[57] The requirement that waiver operates bilaterally excludes the notion of a unilateral abandonment or waiver of a servitude, as contended for on behalf of Pickard. However, abandonment or waiver satisfying that requirement may still be inferred as having tacitly come about through the conduct of the parties."

[43] Put differently, the question is whether there has been such acquiescence in the respondent's doings of things necessarily obstructive to the applicant's joint ownership rights in respect of the immovable property, as would justify the inference that the applicant intended to abandon his joint ownership rights.

Waiver and the facts in casu

[44] I am of the view that there has indeed been such conduct plainly inconsistent with an intention to enforce the applicant's joint ownership rights, or such acquiescence in the respondent's doings of things necessarily obstructive to the applicant's joint ownership rights in the immovable property, as would justify the inference that the applicant intended to abandon his joint ownership rights.

[45] The court ordered the division of the joint estate on 25 August 2000. The respondent was in possession of the immovable property at the time (and is still in possession thereof). If the applicant wished to effect a division of the joint estate at the time of the divorce decree, failing agreement he had to take steps to appoint a liquidator. He was dominus litis in the divorce action and it would not have been unusual for him to effect the appointment of a liquidator. In fact, for the applicant to have gone to the trouble of obtaining a divorce order, but then not to persist with the liquidation of the joint estate in the time period after the decree had been granted, is contradictory of an intention to enforce his ownership rights in respect of the joint estate.

[46] Bearing in mind the minimal value to be realised in the immovable property at the stage of the divorce decree being granted, and the concomitant expenses to be incurred to divide such minimal value, it was not worth the applicant's while to take steps to enforce division. Failing agreement the value of the immovable property would have been realised by forced sale, which would have made it even less worthwhile to divide the joint estate. It can accordingly justifiably be inferred that the applicant took a conscious decision not to enforce division of the immovable property, and to waive his rights in that regard.

[47] Not doing anything for a period of 19 years after the divorce to effect division of the joint estate, accords with the applicant's

decision not to enforce the liquidation of the immovable property at the time of the divorce decree, because of the minimal value to be realised. The applicant decided to waive his ownership rights in the joint estate and not enforce division.

[48] One would have expected some communication by the applicant, especially within the time period after the divorce decree, to see whether division is possible by agreement, if he had not waived his rights. The fact that the applicant chose not to communicate at all with the respondent in the time period after the divorce decree, and for a period of 19 years thereafter, underlines the applicant's decision to walk away from the joint estate.

[49] For 19 years the applicant expressed no interest in taking advantage of the benefits of the immovable property, by dividing the joint estate. For 19 years the applicant expressed no interest in sharing or undertaking to share in the obligations relating to the immovable property, such as paying or contributing to paying the mortgage bond, or maintaining the immovable property. For 19 years the applicant did nothing to improve the immovable property. This accords with the applicant's decision not to enforce division of the joint

estate, and to waive his joint ownership rights.

[50] There is no explanation from the applicant why he acquiesced in the applicant alone shouldering the responsibilities of the immovable

property for 19 years. The only acceptable inference is that the applicant decided not to enforce division of the joint estate, and to waive his joint ownership rights. His conduct was plainly inconsistent with an intention to enforce his joint ownership rights.

[51] Once the immovable property had been paid off, the applicant changed his stance. Only then he exhibited an intention to divide the joint estate. There is no explanation from the applicant why he only attempted to lay claim to joint ownership rights once the mortgage bond had been paid off. The inference is that the applicant only did so as he hoped to opportunistically benefit from the substantial increase in value of the immovable property, created by the respondent.

[52] However, the applicant's change in stance is incapable of undoing his decision taken, waiver of his joint ownership rights[21]. I agree with the respondent's contention that the applicant's bona fides are questionable. The applicant's stance that he is not barred from demanding his share of the joint estate does not take cognisance of the reality of his decision to waive his joint ownership rights.

[53] Other than the applicant's decision at the time of the divorce not to enforce division of the joint estate, due to its minimal value, is the important fact that the applicant stood by while the respondent paid off the mortgage bond over the immovable property over an extended period of time. Upon the respondent doing so, in the context of joint ownership, the horse had bolted. In the context of applicant's history of delay, that in itself amounted to waiver of his joint ownership rights. In the words of Fannin J in the full bench appeal of Margate Estates v Urtel[22], there was inaction on the applicant's part until the completion of the work.

[54] Also, on this point, in the applicant's heads of argument he concedes waiver of his right to share in the movable assets, as the parties "lived apart for many years and... most assets are no longer in existence". In other words, the applicant concedes that delay caused him to waive his rights in respect of the movable assets of the joint estate.

[55] The applicant does not make the same concession in respect of the immovable assets. Although waiver of ownership rights in respect of immovable property is especially difficult to establish, there is contradiction in the applicant's stance as regards waiver. He concedes the impact of delay as far as the movable assets are concerned, but not as far as the immovable assets are concerned. I take cognisance of such contradiction in deciding the matter.

Transfer of applicant's ownership rights to respondent

- [56] Waiver of ownership rights is a unilateral act, whereby the owner abandons or divests himself of his rights in the relevant object, with the result that the object becomes a res nullius[23]. Ownership rights are not transferred to another person by the mere act of waiver. For the abandoned ownership rights to transfer to another person, something more than waiver is required. The new owner must exercise occupatio, take physical control of the object with the intention to become owner[24].
- [57] In casu it suited the respondent not to interact with the applicant in respect of the division of the joint estate, so that she could move on with her life. She accepted the fact that the applicant didn't wish to enforce his joint ownership rights.
- [58] In casu it suited the respondent that the applicant thus waived his rights in the immovable property, in return she enjoyed the sole benefits of the immovable property. She lived in the immovable property and continued building her life without the applicant. She exercised sole control of the immovable property and enjoyed the fruits of her labour, the immovable property. She controlled the immovable property as her own, in the context of the joint estate having ceased to exist.
- [59] There was waiver of the applicant's ownership rights, and appropriation of such rights by the respondent. The respondent was in possession of the immovable property with the intention to exercise sole ownership rights, thereby exhibiting the requisite occupatio for the abandoned ownership rights to be transferred to her.

Respondent's pension interest

- [60] The respondent's pension benefit also forms part of the joint estate[25]. The applicant's 19 years' delay in laying claim thereto, must of necessity mean that such claim suffers the same fate as his claim in respect of his ownership rights over the immovable property. It would be contradictory to accept a deliberate decision not to communicate, because of waiver of ownership rights in one asset, the immovable property, but not because of waiver of ownership rights in another asset, the pension interest.
- [61] The implementation of a claim to another person's pension benefit goes hand in hand with certain procedures. A pension fund's right to make deductions from a pension benefit is highly circumscribed and may be exercised only as expressly provided by section 37D and section 37A of the Pension Funds Act 24 of 1956 (PFA)[26].
- [62] I have not had the benefit of the views of the GEPPF in respect of the relief requested by the applicant. However, it is difficult

envisaging the GEPPF being able to effectively implement what the applicant seeks, 20 years after the divorce. This is aside from it being impossible to, as the applicant claims, "make such an endorsement on behalf of the applicant and pay the applicant within 60 days of decree of divorce".

[63] The applicant was dominus litis with the divorce. If he wanted to implement the division of the joint estate in respect of the respondent's pension benefits, he would have taken steps to do so in the time period following on the divorce decree. The fact that he did not do so, coupled to the extended period of not doing so, leads to the inference that he deliberately decided not to implement the division of the joint estate in respect of the respondent's pension benefits. It justifies the inference that he also intended to waive his rights to his share of the respondent's pension interest. The applicant's conduct is plainly inconsistent with an intention to enforce his ownership rights in respect of the respondent's pension interest.

COURT'S DISCRETION IN TERMS OF RULE 42(1)

[64] If I am wrong in finding that the applicant has waived his ownership rights in the immovable property and the respondent's pension interest, I am still not persuaded that the relief prayed for, be granted. Although rule 42(1) does not specify a time limit, it is a discretionary remedy[27]. Like all discretionary remedies, it must be sought within a reasonable period of time[28].

[65] The applicant has afforded no explanation for the delay in bringing the variation application. Before I can consider entertaining the variation sought by the applicant, I must be satisfied that the delay has been explained.

[66] No reasoning or substantiation is furnished by the applicant why he waited almost two decades to approach the court in an attempt to claim his share of the joint estate. Without proper explanation, it is difficult to conclude that the applicant's delay in approaching the court should be considered "reasonable". Granting such relief after an extended period of inactivity without explanation would run counter to the appropriate application of the Rule 42.

[67] I am accordingly not prepared to exercise my discretion in favour of the applicant.

ORDER

[68] Accordingly I order as follows:

1. The application is dismissed with costs.

M VAN STADEN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: 10 FEBRUARY 2020

DATE OF JUDGMENT: 20 MARCH 2020

ATTORNEY FOR APPLICANT: SHAPIRO & LEDWABA INCORPORATED

ADVOCATE FOR APPLICANT: ADV MELLO

ATTORNEY FOR RESPONDENT: NO APPEARANCE

ADVOCATE FOR RESPONDENT: NO APPEARANCE

[1] Fischer and Another v Ramahlele and Others 2014

(4) SA 614 (SCA) at para 13.

[2] Ibid.

[3] Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others 1999

(2) SA 279 (T) 323 E to F.

[4] At 323I to 324A.

[5] King William's Town Transitional Local Council v Border Alliance Taxi Association (BATA) 2002

(4) SA 152 (E) at 156 I – J.

[6] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984

(3) SA 623 (A).

[7] Estate Sayle v Commissioner for Inland Revenue 1945 AD 388.

[8] 1924 AD 261 at 263 C – E.

[9] Bortslap v Spangenberg en Andere 1974

(3) SA 695 (A) at 704 E – F.

[10] Hepner v Roodepoort-Maraiburg Town Council 1962

(4) SA 772 (A) at 779A.

[11] Mahabeer v Sharma NO 1985

(3) SA 729 (A).

[12] Xenopoulos and Another v Standard Bank of SA Ltd and Another 2001

(3) SA 498 (W) at 512E.

[13] Meintjes NO v Coetzer and Others 2010

- [5] SA 186 (SCA) at para 16; Minister van Landbou v Sonnendecker 1979 (2) SA 944 (A); see also the views of JC Sonnekus in “Abandonnering van eiendomsreg op grond en aanspreeklikheid vir grondbelasting: Aantekeninge” 2004 TSAR 747 and “Vermoënsregtelike implikasies van gevonde sake” 2016 TSAR 731, as well as the views of CG van der Merwe in Sakereg, second edition, pages 227 and 377; see the contrary views of Cramer in “The abandonment of landownership in South African and Swiss law” 2017 SALJ 870.
- [14] See Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC 2011 (2) SA 508 (SCA)
- [15] See the Afrikaans translation of Van der Keessel in Minister van Landbou v Sonnendecker at 946H to 947A.
- [16] 1990 (1) SA 751 (A) at 757 B to D.
- [17] Laws v Rutherford at 263.
- [18] Minister van Landbou v Sonnendecker.
- [19] Ibid.
- [20] 2015
- (1) SA 439 (GJ) at paras 49, 51 and 57.
- [21] JC Sonnekus op cit note 13 in “Vermoënsregtelike implikasies van gevonde sake” .
- [22] 1965
- (1) SA 279 (N) at 290H.
- [23] JC Sonnekus op cit note 13 in “Abandonnering van eiendomsreg op grond en aanspreeklikheid vir grondbelasting: Aantekeninge” and “Vermoënsregtelike implikasies van gevonde sake”.
- [24] JC Sonnekus op cit note 13 in “Vermoënsregtelike implikasies van gevonde sake” and CG van der Merwe in Sakereg, second edition, page 217.
- [25] GN v JN 2017
- (1) SA 342 (SCA) at paras 26 and 34.
- [26] Eskom Pension and Provident Fund v Krugel and Another 2012 (6) SA 142 (SCA); Section 37D of the PFA, in sub-section (1)(d)(i), allows a fund to: “deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be . . . any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979; . . . ! According to the provisions of sub-section (4)(a): “the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the

dissolution of a customary marriage is granted . . .”.

[26] Eskom Pension and Provident Fund v Krugel and Another 2012 (6) SA 142 (SCA); Section 37D of the PFA, in sub-section (1)(d)(i), allows a fund to:

“deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, or the capital value of a pensioner's pension after retirement, as the case may be . . . any amount assigned from such benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979;”

According to the provisions of sub-section (4)(a):

“the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of a customary marriage is granted . . .”.

[27] Nkata v Firststrand Bank Ltd and Others 2014

(2) SA 412 (WCC) at para 27.

[28] Ibid.

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