

SOUTH AFRICA / JUDGMENT

N.A.N v S.S.N (87731/2019) [2021] ZAGPPHC 413 (7 June 2021)

[2021] ZAGPPHC 413

COURT

North Gauteng High Court, Pretoria

BEFORE

C.B. Bhoola

CASE / FILE NUMBER

87731/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 87731/2019

REPORTABLE:NO

OF

INTEREST TO OTHER JUDGES:NO

REVISED

DATE:07

June 2021

In

the matter between: N
A
N[...]
Applicant
(ID:
[...])
and
S
S
N[...]
Respondent

JUDGMENT

BHOOLA AJ

INTRODUCTION

- [1] The applicant in this application, seeks an order against the Respondent, for an appointment of a liquidator and receiver to dispose of immovable property situated at [...] Block [...], S[...], to pay all debts in respect of the said property and to distribute the nett proceeds accruing from the sale of the aforesaid property equally between the parties. Should the application become opposed, the applicant seeks a cost order on an attorney and client scale.
- [2] Although the matter was placed on the unopposed roll, the appearance of the Respondent on the enrolment date necessitated a postponement for the filing of the Respondent's answering affidavit.

FACTS

COMMON CAUSE FACTS

- [3] The following facts are common cause between the parties:

[3.1] The parties were married in community of property on 15th September 2005, which marriage was dissolved by an order of the Regional Court of Pretoria North on the 15th of September

2017. The divorce order was granted with the incorporation of a settlement agreement.

[3.2] It was a material term of divorce order and settlement agreement, amongst other things, that each party would be entitled to purchase a 50% share of the immovable property described as [...] Block [...], S[...], held under deed of Title no. [...], Gauteng Province and that each party would purchase a 50% share of other party within 180 days after the pension or provident fund has made payment to both parties.

[3.3] It was also agreed between the parties that should either party fail to purchase the other party's 50% share, the said property would be sold and the proceeds be divided equally between them, subject to the full settlement of the outstanding bond.

[3.4] Despite the fact that the parties are co-owners of the registered property, the Respondent continues to reside on the property free of charge. Consequently, the Respondent is the only person currently benefiting from the property

APPLICANTS

FACTS

[4] Applicant's evidence was that the respondent refused to claim his pension interest from applicant's pension fund, thereby delaying the sale of the property. Since the respondent refuses to

exercise the terms of the aforesaid settlement agreement, the applicant seeks an order in terms of the actio communi dividundo for the liquidator be appointed to dispose of the property in terms of the settlement agreement.

RESPONDENTS

FACTS

[5] The respondent's evidence was the reason for his non-compliance with the divorce settlement order was that the applicant had not co-operated with him and furnished him with the incorrect pension fund name. He was subsequently furnished with the new forms, completed the forms and submitted them for payment of the pension fund. He requested the court to allow him an indulgence to pay within sixty (60) days after respondent's receipt of his pension fund benefits and not to appoint a liquidator.

ISSUES

FOR DETERMINATION

[6] The issues for determination are:

[6.1] Are the parties' co-owners;

[6.2] Is the applicant entitled to an order for division of the joint estate;

[6.3] Under what circumstances is a liquidator to be appointed.

LAW:

[7] In order to succeed with the relief claimed, the applicant must prove:

[7.1] joint ownership

[7.1.1] The legal position is relatively simple. When two parties, married in community of property, divorce, their ownership of undivided and indivisible shares of the joint estate changes to free-co-ownership of determinate and divisible shares. It is so that in our legal system joint ownership is possible and legally permissible. Each owner has a right to share in the property of which he or she is a co-owner. [1]

[7.1.2] It is trite law that a person cannot be forced to remain a co- or joint owner. Any co-owner has a right to have co-ownership terminated by placing reliance on the action *communi dividundo*. [2]

[7.2] inability of parties to agree to the termination of joint ownership, or to exercise the terms of an agreement to end joint ownership, or the inability to come to an agreement on how joint ownership will come to an end;

[7.2.1] The law is clear on this aspect. In the case of *Gillingham v Gillingham* [3]

"The law governing this matter seems to me to be perfectly clear. 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 the 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 someone (whether he is called liquidator, receiver, or curator-perhaps curator is the better word) to collect, realise, and divide the estate. And that that has been the practice in South African court is clear."

[7.3] the proposed method for a fair division; [4]

[7.3.1] The relief requested emanates from the common law cause of action, of the *actio communi dividundo*. [5]

[7.3.2] That the court has a discretion to appoint a liquidator to divide a joint estate, even after a divorce order had been granted. [6]

APPLICATION OF LAW TO

FACTS

[8] In so far as the application of the facts to the law are concerned there is no dispute between the parties regarding all three requirements that are required to be met.

[8.1] There is no dispute that the parties share joint ownership in the said property;

[8.2] There is no dispute regarding the division of the joint estate. Both parties agree that the joint estate must be divided;

[8.3] There is no dispute regarding the appointment of the liquidator between the parties.

[9] In principle, the respondent was not opposed to the application for the appointment of the liquidator but merely requested an indulgence from the court for his pension benefit to pay out so that he could purchase the applicant's half share in the said property.

[10] Counsel for the applicant provided heads of arguments and argued that a case had been made out for the appointment of a liquidator and requested that the application for the appointment as the liquidator should be granted to finalise the matter between the parties and each can go their separate ways.

[11] The applicant submitted all the requirements for the order had been complied with and should the application for the appointment of the liquidator not be granted, numerous problems may arise prospectively and the applicant will then have to approach the court again and the matter would be delayed even further;

[12] The respondent's attorney, in argument submitted that the applicant's pension benefit had in the meantime paid him an amount of approximately R33 000.00. That amount was insufficient for him to purchase the applicants 50 % share of the immovable property. It was submitted further, that the dwelling had a sentimental value to him and in order to retain possession of the house, he resigned from his employment. He is waiting for his pension interest to pay him out so that he could purchase the said property from the applicant. He anticipated that payment will be made in two (2) months. Respondent was prepared, in the interim to make a payment of approximately R33 000-00 that he already received from the applicant's pension fund.

[13] In reply to the Court's enquiry regarding the possibility of settlement having been traversed between the parties, the Applicant's response was that no settlement was forthcoming from the Respondent. The matter was then stood down for possible settlement negotiations between the parties, which was unsuccessful.

RULING

[14] As alluded to above, there appeared to be no objection to the application for the appointment of the liquidator to be granted between the parties. What is patently obvious is the delay in finalising the estate.

[15] It is lamentable that had the settlement agreement specified the time frame under which the transactions had to be completed, the need for this application would not have arisen.

- [16] The applicant was justified in approaching the court to expedite and finalise the matter and discharged the onus that is required and was justified to approach the court to expedite the appointment of a liquidator. The applicant, personally approached the respondent to try and resolve the matter without coming to court, however, respondent did not cooperate and applicant was forced to approach the courts for the relief as claimed.
- [17] This then leads me to the issue of the costs. The applicant, requested costs on an attorney and client scale due to the fact that the respondent was responsible for the delays in finalising the estate. The respondent however, requested that each party pays their own costs.
- [18] The general rule is that costs must follow the outcome. However, the Court has a discretion to make any appropriate costs order, considering all the relevant circumstances of the case and looking at such facts in totality.
- [19] From the perusal of the settlement agreement there was no time span indicated as to when the parties should have applied for the pension funds merely that payment was to be made within 180 days of receipt of payment.
- [20] I do not believe that the respondent should be mulct with costs on an attorney and client scale for wanting to oppose the application and put his version before the court.
- [21] For the sake of protecting both party's interests and to save costs of the joint estate that still exists between the parties, I am of the view the applicant is entitled to her order. However, the indulgence sought by the respondent is not unrealistic and in the result I make the following order.

ORDER

[22.1] That Alan Herbert Jordaan and or such other person be appointed as a liquidator and receiver to dispose of immovable property situated at 152 Block BB, Soshanguve, held under Deed of Title no. T38079/1998, to pay all debts in respect of the said property and to distribute the nett proceeds accruing from the sale of the aforesaid property equally between the parties.

[22.2] That such appointment is suspended until 24th July 2021 to enable the respondent to obtain his pension benefits and to make payment to the applicant on or before the 24th July 2021, failing which the order granted in paragraph [22.1] will come into effect from 25th July 2021.

[22.3] The respondent is ordered to pay the applicant's agreed or taxed cost on the party and party on the scale.

C. B. Bhoola

Acting Judge of the

High Court of South Africa

Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judges whose names is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 07 June 2021.

APPEARANCES

Counsel for the Applicant

: Advocate AC Diamond

Instructed by

: JW Wessels & Partners

Counsel for the Respondent

: Mr P Sebola

Instructed by

: Peter Sebola Attorneys

Date of Hearing

: 24 May 2021

Date of Judgment

: 07 June 2021

[1] Ex parte Menzies et Uxor 1993 (3) SA 779(C)

[2] Trojan Exploration Co. (Pty) Ltd v Rustenburg Platinum Mines Ltd Ibid

[3] 1904, TS 609,613

[4] Robertson v Theron (1978) 2 All SA 264 (A), Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd) 1996 (4) SA 499(SCA)

[5] Amler's Precedent of pleadings, Harms, Eight Edition, 223-225

[6] Nkosi TA Receiver and Liquidator in Matrimonial Affairs: A legal entitlement or a drastic measure? November 2011 De Rebus 22, Maharaj v Maharaj 2002 (2) SA 648 (D)

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