

SOUTH AFRICA / JUDGMENT

P v P (A163/2015) [2016]

ZAFSHC 13 (28 January 2016)

[2016] ZAFSHC 13

COURT

Free State High Court, Bloemfontein

BEFORE

Ploos van Amstel, Hinxla

CASE / FILE NUMBER

A163/2015

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Appeal No. : A163/2015

In the appeal between:-

M. H. P.

Appellant

and

N. W. P.

Respondent

CORAM:

PLOOS VAN AMSTEL, J et HINXLA, AJ

HEARD ON: 25 JANUARY 2016

DELIVERED ON: 28 JANUARY 2016

- [1] The parties in this appeal were previously married to each other in community of property. They were divorced on 7 September 2012 in terms of an order which provided for the division of the joint estate. On 16 March 2015 the appellant launched an application in the regional court for the appointment of a receiver as the joint estate had not been divided. The respondent opposed the application and it was dismissed by the learned magistrate, who

ordered the appellant's attorney to pay the costs of the application de bonis propriis. The appeal before us relates to the dismissal of the application and to the costs order.

- [2] The facts are briefly as follows. The divorce order was granted on 7 September 2012. The respondent then lodged an appeal against the refusal of an order for the forfeiture of the benefits of the marriage in community of property. The appeal came to nought as it was noted late and the application for condonation was refused on 19 June 2014.
- [3] The respondent is a practising attorney. He continues to occupy the house which was once the matrimonial home and is owned by the joint estate. Shortly after the application for condonation was refused the respondent and the appellant's attorney started to exchange correspondence in which both parties requested settlement proposals from the other. The respondent included figures in one of his letters, which he said reflected the estimated values of the assets. These were questioned and not accepted by the appellant. It would appear that the appellant was reluctant to formulate settlements proposals until she knew how much she was going to receive in respect of her share of the respondent's pension interests. So the matter dragged on for about nine months, with letters being exchanged that said little and achieved nothing, until the appellant launched the application for the appointment of a receiver on 16 March 2015.
- [4] In practice the division of a joint estate seldom presents difficulties as the parties usually agree on how the division should

be done. In the absence of such agreement the court can order the division itself or it can appoint someone to do so on its behalf. The basis on which the magistrate dismissed the application was that she was not satisfied that the parties had engaged each other meaningfully with a view to coming to an agreement, and that the appellant had failed to prove that she and the respondent had been unable to agree.

- [5] The issue in this appeal is whether an applicant for the appointment of a receiver has to show that the parties have tried to reach an agreement but have been unable to do so. The magistrate referred to *Maharaj v Maharaj and Others*[1] where Magid J said:

"The parties are entitled of course to agree on the manner of division. If they cannot agree a liquidator may have to be appointed."

This statement must be seen in the context of the facts of that case. The learned judge was not dealing with an application for the appointment of a liquidator and he did not purport to deal with the requirements for such an appointment. The case is no authority for the proposition that a receiver will not be appointed unless the applicant shows that an agreement cannot be achieved.

- [6] In *Gillingham v Gillingham*[2] Innes CJ said the following:

“The law governing this matter seems to me 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 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 ...) to collect, realise, and divide the estate. And that that has been the practice in South African courts is clear.”

- [7] In other words, in the absence of agreement between the parties the court may order the division itself, or it may appoint someone to effect the division on its behalf. In *Ex Parte De Wet* NO[3] Horwitz J used the expression ‘...in cases where the spouses do not agree to an amicable division’. The reason why the parties have not reached agreement does not seem important to me. There may be a genuine difference of opinion or one or both of the parties may simply be difficult or unreasonable. But the court cannot compel them to agree, nor should the court in my view decline to come to their assistance on the basis that they have not tried hard enough. In *Van Onselen NO v Kgengwenyane*[4] Comrie J said that in exercising the power to divide the joint estate, or to supervise its division, the courts tended to apply the rules developed for the dissolution of commercial partnerships. It seems plain that in the absence of agreement between the partners the court will appoint a liquidator without enquiring why the parties have not agreed on a division. It is the absence of an agreement that is relevant, not whether the parties have made a good enough effort to agree.
- [8] I can conceive of a case where one of the spouses resists the appointment of a receiver on the basis that the parties are negotiating about the division of the joint estate and are likely to reach an agreement. But if no agreement is reached in a reasonable time and the other party persists in the application I can see no reason why a receiver will not be appointed. In *The South African Law of Husband and Wife*[5] the learned authors say, with reference to *Revill*,[6] that neither of the parties is entitled to take it upon himself to effect the division if the other spouse objects. Whether or not the objection is reasonable seems to me to be entirely irrelevant.
- [9] Counsel for the respondent submitted that a court will not appoint a receiver as a matter of course and simply because one of the parties asks for it. That is probably correct. The court should in my view be told why there is a need for the appointment of a receiver. There may be different reasons in different cases, but I do not agree that a receiver will only be appointed on proof that the parties are unable to reach agreement. For example, a party who does not want to negotiate, for whatever reason, seems to me to be entitled to ask the court to order a division or appoint a receiver.

- [10] I think it is clear on the papers that neither of the parties made a serious effort to reach agreement expeditiously. Letters were not responded to in good time, proper valuations were not obtained, both parties failed to make settlement proposals which were worthy of serious consideration and neither of the parties made arrangements with the pension funds to transfer to the appellant what was owing to her. The magistrate delivered her judgment on 26 June 2015, nearly three years after the parties were divorced. It is now January 2016 and there is still no agreement.
- [11] In my view the magistrate should have granted the application for the appointment of a receiver. Counsel for the appellant submitted that in that event the costs of the application before the magistrate should be paid out of the joint estate. This seems fair as both parties must take some of the blame for the failure to reach agreement on a division.
- [12] The order sought in the notice of motion is unclear in some respects and both counsel asked us, in the event of us appointing a receiver, to reword the order in so far as may be necessary. They also agreed that the order should be suspended for a period of thirty days so as to give the parties a final opportunity to reach agreement on a division.

ORDER

[13] The order which we make is as follows:

- (a) The appeal succeeds.
- (b) The order made by the magistrate dismissing the application is set aside, as is the costs order.
- (c) Mr PJ Joubert, an attorney of the firm Kramer, Weihmann and Joubert in Bloemfontein is appointed as receiver of the joint estate of the parties with the following powers:
 - (i) To take possession of all the assets of the parties, movable and immovable, and for that purpose to enter upon any property occupied by either of the parties, and to recover possession of any such assets from third parties;
 - (ii) To sell any assets of the joint estate by public auction or private treaty;
 - (iii) To pay any debts of the joint estate, including his own fees, and to divide the balance between the parties equally;
 - (iv) To sign any documents on behalf of the parties which are required for the sale and transfer of assets of the joint estate;
 - (v) To obtain legal advice at the expense of the joint estate or apply to this court for directions or declaratory orders regarding the joint estate.
 - (vi) To prepare a detailed account of what he had done when the division is complete and furnish this to both parties.

- (d) The parties are directed to co-operate with the receiver in the carrying out of his functions.
- (e) The orders in (c) and (d) above will only take effect thirty days after the delivery of this judgment and will lapse if the parties had by then concluded a written agreement, signed by both of them, regarding the division of the joint estate.
- (f) The costs of the application in the magistrates' court for the appointment of a receiver are to be paid out of the joint estate.
- (g) The respondent is ordered to pay the costs of the appeal.

J.A. PLOOS VAN AMSTEL, J

I agree.

M.D. HINXA, AJ

On behalf of appellant:

Adv S.J. Reinders

Instructed by:

McIntyre & Van Der Post

BLOEMFONTEIN

On behalf of respondent:

Adv A. Williams

Instructed by:

Phalatsi & Partners

[1] 2002

(2) SA 648 (D & CLD) at 652C.

[2] 1904 TS 609.

[3] 1952

(4) SA 122 (OPD) at 125E.

[4] 1997

(2) SA 423 (BSC) at 428 B-C.

[5] The South African Law of Husband and Wife, 5th ed, Hahlo and Kahn, p382.

[6] Revill v Revill 1969 (1) SA 325 (C)

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