

SOUTH AFRICA / JUDGMENT

S.L.M. v H.A.C (18281/2021) [2025] ZAGPJHC 687 (19 June 2025)

[2025] ZAGPJHC 687**COURT**

South Gauteng High Court, Johannesburg

BEFORE

NTLAMA-MAKHANYA AJ

CASE / FILE NUMBER

18281/2021

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****CASE NO: 18281/2021****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: NO****DATE: 19 June 2025**

In the matter between:

S[...],

L[...]

M[...]

Plaintiff

And

H[...],

A[...]

C[...]

Defendant

Summary:

Marriage in community of property. Divorce Act 70 of 1979.
Dissolution of marriage-07 March 2019. Decree incorporating settlement agreement. Claim for payment-net assets at date of divorce.
Demand - not from division of joint estate, thus from evaluation of the net assets at date of dissolution. 37D-Pension Fund Act
24 of 1956-link with sub-subsection 7(7) and 7(8) -Divorce Act – pension interests only on divorce. 28(e) -Pension Fund Act as amended linked -Divorce Act-accrual -pension benefit - date of court order.
Pre-disposed assets
and post-facto assets
are not subject to future obligation. No tax consequences for a “past event” and “future benefit interest”.
Application -
granted.
ORDER
(i)
The Defendant is ordered to pay the
Plaintiff an amount of R2
988 639.00 (two million nine hundred and eighty-eight thousand six hundred and thirty-nine).
(ii)
The Defendant
is to make payment of interest of the amount of R2 988 639. 00 to the
Plaintiff at the prescribed rate from the date
of demand to the date
of payment.
(iii)
The Plaintiff
and Defendant's joint ownership in the timeshare units, namely the
Magalies Park Two Shareblock Ltd and Champagne
Valley Shareblock, is
ordered to be terminated within 30 days of this Order.
(iv)
The Defendant
is directed to sign all documentation, inclusive of a Power of
Attorney, required in order that the timeshare units
may be marketed
and sold.
(v)
The Defendant
is ordered to reimburse the Plaintiff in the sum of R 57 813.00 being
50% of the levies paid by the Plaintiff for
the years 2019 to 2025.
(vi)
The proceeds
from the sale of the timeshare units shall be shared equally between
the Plaintiff and the Defendant.
(vii)
The costs of this

application are granted on a party and party scale on Scale B in terms of Rule 69.

JUDGMENT

NTLAMA-MAKHANYA AJ

- [1] This is an application in terms of which the Plaintiff claims an amount of R2 988 639 against the Defendant following the dissolution of their marriage. Both parties appeared before me in a trial of a long run which took place for a period of 7 days with effect from 17 February 2025 until 25 February 2025. The Plaintiff was legally represented whilst the Defendant appeared on his own behalf.
- [2] The Plaintiff called two (2) Expert Witnesses, and the Defendant had one (1) Expert Witness which were brought in terms of Rule 36(9) of the Uniform Rules of the Court. The Expert's testimonies and evidence will be presented below. The parties, having agreed on the appointment of a Forensic Expert: Mr Harcourt Cooke with a mandate to evaluate the net assets of their joint estate with effect from the date of the dissolution of marriage at 07 March 2019, his Report will also be reflected herein as an overall assessment of the joint estate.
- [3] In this case, the background is important for the justification of the content of this matter.

Background

- [4] The parties were married to each other in community of property on 03 July 1995 in Johannesburg from the date of marriage and then relocated to Australia in the year 2014. Unfortunately, the marriage did not live up to its intended lifespan and the Defendant filed for divorce and claimed amongst others:

“an order that the Plaintiff forfeit her rights to share in benefits of the marriage, alternatively division of the assets and liabilities of the joint estate which are situated and/or held outside of Queensland, Australia.”

- [5] The Plaintiff defended the action and also claimed for an order for inter alia a (i) decree of divorce and division of the joint estate comprising all of the assets situated in the Republic of South Africa (ii) alternatively that a receiver and liquidator be appointed to attend to the division of the joint estate and to realise the

whole of the joint estate assets, movable and immovable situated in South Africa, and (iii) for that purpose to sell them or any part of them by public auction or private agreement as may see most beneficial and (iv) to divide the assets of the joint estate after payment of its liabilities in accordance with the account, which shall result in the residue of the joint estate being allocated in equal proportion between them.

[6] The marriage was dissolved on 07 March 2019 with a decree of divorce Case No: 2017/31724 which was inclusive of the settlement agreement between the parties. Of importance, which is the content of this application, was the agreed settlement regarding the division of the joint estate. It is stated therein that:

[6.1] The joint estate comprises assets and liabilities which are situated both in South Africa and in Australia. These assets and liabilities are under the control of each and/or both Parties. It is further recorded that the assets comprise of, but are not limited to, immovable properties, pension interest, business interests, shareholdings and interests in various companies.

[6.2] It has been agreed between the Parties that the joint estate will be divided between them in a just and equitable manner in order that the division thereof, taking into account all assets and liabilities situated in both South Africa and Australia, will result in each party receiving and /or retaining, upon division, an equal portion of the joint estate, in other words 50% thereof.

[6.3] In order to give effect to the division contemplated in clause 6.2 above, the Parties have agreed to appoint a suitable qualified expert, namely Steven Harcourt-Cooke, Chartered Accountant as the Forensic Expert, (hereinafter "the Forensic Expert"), who having agreed to act herein, is hereby authorised to investigate the extent and composition of the joint estate and assets and liabilities under each parties' control and thereafter to compile a report, which report shall include directions as to the manner of division to give effect to clause 6.2 above.

[6.4] Either party shall be entitled to have the report of the Forensic Expert elevated to an order of either the Australian Court, or the South African Court or both Courts, provided that appropriate notice thereof has been provided to the other party.

[6.5] The Parties hereby agree that the Forensic Expert shall be vested with the powers as set out in Annexure "A" attached hereto." In terms of the consent forms annexed to the agreement of settlement marked "B1" and "B2" respectively, the Plaintiff and Defendant confirmed that by their signature thereto they consented to the appointment of the referee ("the Forensic Expert") to determine the value of the joint estate by way of the provision by the parties of all information that he may require in respect of their financial affairs as set out in the consent forms.

[6.6] The Parties agreed to the jurisdiction of the Australian Court and in a manner consistent with the Australian proceedings and for the Australian Court to make a property providing for a full and final settlement of the matter by doing all acts and things that will be essential for the facilitation of the resolution of the matter with urgency.

[7] Following the agreement for the appointment of the Forensic Expert, the specific terms of reference were agreed as follows:

[7.1] (to) determine the values of each parties' estate with specific reference to amongst others:

[7.1.1] the right to make investigations or inspect all documents and advise the parties and/or their legal representatives of any additional documentation he requires in which event such documentation, if available, shall be produced to him.

[7.1.2] the right to make physical inspection of assets.

[7.1.3] afford both the [parties] personally the opportunity to make representations to him about any matter relevant to his duties to give due consideration to the wishes of both [of them] pursuant to the representations made by them and to make such decisions in respect thereof, as he may deem fit.

[7.1.4] the right to convene any enquiry deemed to be conducted in accordance with Section 38 of the Superior Court Act 10 of 2013. In this regard, it is specifically recorded that the referee shall have the power to approach the High Court for such an order as he may deem necessary for the purposes of this report and these costs shall be borne by joint estate, save if a court order otherwise.

[7.1.5] shall be entitled to receive expert advice from any duly qualified person, should the referee, in his sole discretion, require same in regard to the valuation of any asset and the cost of receiving any such expert advice shall be borne by the joint estate, as set out hereunder and the referee shall further be entitled to engage the services of any qualified person or persons to assist him in determining a proper valuation of the estate.

[8] In this regard, the Forensic Expert after an intense assessment and evaluation of the parties' estates which was evaluated from the date of the dissolution of the marriage as of 07 March 2019, released his Report of valuation of the Joint Estate on 31 October 2020. The outcome as presented in the Report was determined to be as follows:

South Africa Australia Total Defendant – Schedule A 13 828 006 381 153 14 209 159 Plaintiff – Schedule B 8 427 797 -195 916 8 231 881 Total joint estate 22 255 803 185 237 22 441 040 50% division of joint estate 11 220 520 Difference between the value of assets held by the parties respectively owing to Plaintiff 5977 278 Amount payable by the Defendant to the Plaintiff to divide the joint estate equally 2 988 639

[9] Therefore, it is this Report on Valuation of the joint estate that has become the gist of this application as the Plaintiff demanded to be paid the said amount of R2 988639.00 (two million nine hundred and eighty-eight thousand six hundred and thirty nine rand); with interest at the prescribed rate from the date of demand to the date of payment; and costs of suit as against the Defendant in the event that he defends the action.

[10] Having laid the background without exhausting it, it is imperative that the contents of this application be placed before this Court.

The Parties'

Submissions

Plaintiff:

- [11] The Plaintiff submitted that following the dissolution of their marriage which was in community of property on 07 March 2019 and having agreed on the division of the joint estate and appointment of a Forensic Expert with the latter releasing the Report on 31 October 2020 with an outcome for the payment of R2 988639.00 to the Plaintiff by the Defendant, the latter despite demand, refused to pay the said amount.
- [12] In addition, the Plaintiff further submitted that they were joint owners of timeshare units at Magalies Park Two Share Block Limited purchased on 7 March 1999; and Champagne Valley Resort Share Block Limited

purchased on 27 May 2008. The timeshare units formed part of the joint estate at the effective date ("the timeshare units").

She further submitted that they jointly appointed Forensic Expert including the market values (50%) of the timeshare units in both the Plaintiff and Defendant's schedule of assets and liabilities.

- [13] The Plaintiff also sought the Defendant's agreement to terminate their joint ownership in the timeshare units by way of the sale thereof on the open market. The Plaintiff has from the effective date on which date the joint estate came to an end, with no assistance or contribution from the Defendant, made payment of the annual levies in respect of both timeshare units, for the years 2019 to February 2025 in the total sum of R115,626.00, being: R54,895.20 in respect of the Magalies Park timeshare; and R60,731.00 in respect of the Champagne Valley timeshare.
- [14] The Plaintiff further submitted that the Defendant has refused, despite demand and or request, to agree to the sale of the aforesaid timeshares, and to contribute to 50% of the levies due notwithstanding that neither the Plaintiff nor the Defendant utilised the timeshare.

Defendant:

- [15] On the other hand, the Defendant refuted the submissions by the Plaintiff and contended that the value of the assets of the joint estate was not correctly calculated by Mr Harcourt-Cooke. He submitted that the value of the said assets was needed to be calculated with the effect from 7 March 2019 to be reflective of the net of deemed tax liabilities. Alternatively, if Mr Harcourt-Cooke was unable to calculate the tax liabilities in respect of any assets accurately to calculate the joint estate without deeming any tax liability so as to reflect their gross values and correct valuation as at 07 March 2019 to be (i) amended so that all assets are calculated net of accrued tax liabilities or adjusted so as to reflect their deemed gross values; (ii) values of monies found to have been retained by the Plaintiff as of 07 March 2019 which were not disclosed by her and properly investigated by the Forensic Expert are to be added to the value of the Plaintiff's asset value in the joint estate including but not limited to the proceeds of goodwill to her employer and any amount found to have been retained by the Plaintiff from her relocation allowance. The Defendant submitted that the division of the

estate is to be given effect in terms of the correct valuations wherein the party in possession of the greater value in terms thereof, paying to the other party an amount equal to half the difference in the values of the assets in each party's possession.

- [16] Further, in response to the Plaintiff's amended plea, the Defendant admitted to the quest for the sale of timeshare units by way of sale, thus, denied that he had refused to do so. He also denied that he was obligated to agree to same as the assets and liabilities of the joint estate were to be distributed as part of the division as a composite joint estate and he was not obligated to agree that they be distributed in a piecemeal fashion. In addition, he denied that he was not prepared to contribute to the payment of annual levies required and pleaded that he was not offered use of the timeshare assets and therefore not obligated to contribute to the said levies. Also, he had no knowledge that the Plaintiff utilised the timeshare or not and therefore did not admit that she did utilise same and admitted he had not agreed to the sale of the timeshare units and thus denied that he was under any obligation to agree to the sale of the joint estate prior to the distribution of the joint estate. He also admitted that the Plaintiff sought such an order, however, denied that she was entitled to it and she had to be put thereof.

Expert Witnesses: Plaintiff

- [17] In this case, as noted above, the Plaintiff had two Expert Witnesses. First, Advocate Shirley Nathan SC who is a specialist in matrimonial property law. Advocate Nathan in her report dated 15 February 2022 and during oral testimony gave an overall framework pertaining to the division of the joint estate on divorce. In her report, she specifically focused on the principles regulating the division of the joint estate on the date of divorce, which in this case was 07 March
2019. She submitted that from the date of divorce there will be no existence of the joint estate because the same is divided on the said date. Even if either party claims an adjustment of the assets, such claim must be made prior to the order of court being granted. Similarly with the claim for a forfeiture of benefits by virtue of marriage in community of property has also to be granted on divorce.
- [18] She then put emphasis on the application of these principles regarding the case at hand. She considered the implications of clause 3.2 of the settlement agreement wherein the parties had agreed for the division of the estate in a just and equitable manner which would result in each party receiving 50% of the assets and liabilities which were situated in both South Africa and Australia. According to her, it was evident that there was no chance of being an adjustment in either party's favour by any body by virtue of the words "an equal portion of the joint estate" which meant 50% thereof. In her analysis, she provided a microscopic lens on the claims by both parties that they did not contemplate any other allocation other than an equal division of the joint estate as contained in the signed agreement signed by them.

[19] She also highlighted that the date of divorce was not in dispute and served as a benchmark for the division of the net value of the assets as at the effective date of the dissolution of the marriage. Further, the transactions that were concluded before that date have no bearing on the value of the net estate. She also stated that although the Defendant denied that Mr Harcourt-Cooke acted professionally and acted in accordance with his powers and of the firm belief that the transactions which took place before the effective date should have been considered, such denial and belief were misplaced. In this regard, reference was made to the VW Polo motor vehicle which was allegedly sold by the Plaintiff without his knowledge that should have been included in the joint estate. In this claim, Advocate Nathan dismissed the contention as incorrect in that the asset was disposed on 31 August 2018 and meant that it was no longer an asset at the date of divorce. This was the case with the Defendant's criticism of Mr Harcourt-Cooke for not considering the sale of immovable property in Umdloti property that also took place before the date of dissolution of marriage that the said property did not belong in the estate at the date of the dissolution of the marriage.

[20] She also considered the substantiation and validation of her contention that Mr Harcourt-Cooke valued all the documentation that was made available to him as at the date of dissolution of the marriage. She also indicated her own limitation not to comment on the method regarding the valuation of the estate but affirmed the application of the principles regarding the division of the joint estate as applied by Mr Harcourt-Cooke. It was in this regard that the Plaintiff formulated her claim based on Mr Harcourt-Cooke's

recommendations in his report. She also submitted that the Defendant's continued denial of the accuracy of Mr Harcourt-Cooke's report, he failed to present any credible evidence other than what he alleged was the non-consideration of the properties that were disposed of before the date of the dissolution of the marriage. She was therefore satisfied that Mr Harcourt-Cooke complied with the mandate that regulates the application of the laws regarding the division of the joint estate.

[21] The second witness was Mr William Heret Hunter Thyne who is the Founding Director: Thyne Jacobs INC with a special focus on Pensions Funds, Insurance Law and Financial Advisory and Intermediary Services (FAIS) provided an opinion regarding taxation and pension interest on date of divorce. His opinion was on whether the parties' joint estate was consistently accounted for in Mr Harcourt-Cooke's report. In this regard he highlighted the Defendant's dissatisfaction with Mr Harcourt-Cooke's report due to the alleged "inconsistent Tax treatment of the Estate assets". I do not intend to reproduce Mr Thyne's opinion and or what is already captured in the facts of this case. Thus, of importance was his general summary on the contentions by the Defendant in that the:

(21.1] Basis for the division of the Estate was to divide the value of the estate by two and allocate to each half of the estate to the parties wherein the operative phrase of the "joint estate" serves as the division of all the assets in the joint estate.

[21.2] With regard to non-retirement the assets are owned in the fullest sense by the parties wherein the value of these assets can be determined and then equally split between the parties easily.

[21.3] The Living Annuity is a financial product that is only available to a taxpayer who was a member of a pension fund and has since retired which meant that it is a post-retirement financial product purchased by the Pension Fund for a specific member and to be paid as an annual regular income.

[22] Further, in his opinion, he pointed out that there was no reason to take the tax consequences of any potential disposal of the joint assets into account when valuing the assets and dividing the joint estate. He contended that the general principle is that the incident of tax is calculable on accrual or disposal. This means that none of these assets (VW motor-vehicle and Umdloti property were at the date of divorce subject to capital gains tax because the latter is dependent on numerous variable factors such as the taxpayer's marginal rate of tax in the tax year of the disposal and the inclusion rate of any capital gain. The inclusion rate is set by the fiscus and since 2021, when Capital Gains Tax (CGT) was introduced, that has been amended. Accordingly,

as the assets of the joint estate were not disposed of at the date of divorce the tax consequences of any future disposal would be speculative. Mr Thyne brought to the attention of this Court the judgment of the Supreme Court of Appeal (SCA) by Wallis, JA in *Fundsat Work Umbrella Pension Fund v Guarnieri*[1] who stated that in "judicial proceeding's facts are preferred to prophecies. If an asset has not been sold placing a value on the asset is a prophecy as no one will ever be able to ascertain if a value is market-related until the asset is sold". He noted that the retirement assets cannot be treated in the normal course as the legislature has specifically provided how they will be taxed on accrual and until an accrual there is no value that can be attributed to it. On accrual the Income Tax Act 58 of 1962 sets out the tax rates that will be applied to the benefit, which is dependent on whether the accrual was a "withdrawal benefit" or "retirement benefit". The basis for the division of the joint estate regarding Living Annuity enjoys protection in terms of 37A and 37B of the Pension Funds Act 24 of 1956. He believed that in this regard, there is no reason to take the tax consequences of any potential disposal of the joint estates into account when valuing the assets and division of the joint estate. Therefore, he was finally of the opinion that the division of the joint estate which was not disposed of at the date of divorce, the tax consequences of any future consequences will remain speculative.

The Defendant's Witness

[23] The Defendant's Witness, Mr Bernard Balkin in his Forensic Accounting Report dated 29 January 2025 addressed the matters of concern raised by the Defendant who was of the view that they were not correctly considered by Mr Harcourt-Cooke. Similarly, herein, I am not going to regurgitate the issues raised but to provide a summary of what each of aspects entails as raised by the Defendant and addressed in the Report. In this regard, Mr Balkin highlights that the value of the assets on the date of divorce as reported by Mr Harcourt-

Cooke was situated at:

South Africa Australia Total Plaintiff – Schedule A 13 828 006 321 153 14 209 159 Defendant –
Schedule B 8 427 797 195 916 8 8 231 881 Total Joint Estate 22 255 803 185 237 22 441 040 50%
Division of the Joint Estate 11 220 520

[24] Further, his assessment of the above, he indicated that Mr Harcourt-Cooke's valuation of the joint estate established that

Dr M[...] had less assets as opposed to Dr H[...] which were calculated as follows.

Plaintiff Defendant Assets and Liabilities 14 209 159 8 231 881 Payable by/to (2 988 639) 2 988 639
Value of Estate after equalisation 11 220 520 11 220 520

[25] On his analysis of the division of the joint estate as per Mr Harcourt-Cooke Report, he stipulates that the distribution had to be effected as follows:

R....

Plaintiff's 50% share of timeshare units (R4 450 plus R2 500)6 950

Proceeds from sale of Umdloti property - balance at 3 June 2020 (p0019)

.....1

701 036

Balance payable in cash.....201

206

Settlement of Defendants loan account In Deftologix (Pty) Ltd.....1 079 44Z

Settlement Total.....2

988 639

[26] He then argued that from his review of the various documents, he established that there has not been a consistent and fair (or "just and equitable") treatment by Mr Harcourt-Cooke of the tax implications in recording the asset values. Further, Mr Harcourt-Cooke failed to adhere to his mandate to determine a just and equitable distribution of the joint estate. He then focused on the tax implications on the Capital Gains Tax Calculation on the Deftologix Shares. His focus was on:

[26.1] Literature – Correct Treatment:

Mr Balkin pointed out that in the field of forensic accounting there are applicable principles like in any other profession. He drew lessons from the Global research that supports the practice of valuing assets before tax in the context of divorce proceedings as it contributes to equitable settlements and financial clarity during divorces. The approach to pre-tax value, forensic accountants can provide an equitable distribution of assets, considering the financial situation of both parties involved. It is essential to handle these valuations carefully to ensure a just outcome

in divorce settlements.

[26.2] Financial analysis:

Fair treatment of Tax on Assets

In this instance he contended that his sole disagreement regarding the value of the assets being on the treatment or lack thereof was on the Capital Gains Tax on the valuation of Mr H[...]’s shares in Deftologix and consequently the quantum difference between the assets held by each of the parties.

[26.3] Consistency and Clarity:

He further emphasised Mr Harcourt-Cooke’s misplaced mandate of lacking to determine the just and equitable distribution of the parties’ assets. He pointed out that the benefits of consistency and clarity is addressed in International Financial

Reporting Standards' ("IFRS") Conceptual Framework for Financial Reporting and United States Generally Accepted Accounting

Practice ("US GAAP") Financial Accounting Standards Board ("FASB") Conceptual Framework (Statement of Financial

Accounting Concepts (SFAC) No. 8). This is also supplemented by an underlying principle of accounting that recording is based on the accrual basis which is outlined in various accounting standards best described under US GAAP Financial Accounting Standards Board ("FASB"). Conceptual Framework (Statement of Financial Accounting Accrual) accounting depicts the effects of transactions

and other events and circumstances on a reporting entity's economic resources and claims in the periods in which those effects occur, even if the resulting cash receipts and payments occur in a different period.

[26.4] Taxable Event

He submitted that he considered that the issue in dispute was to determine the root cause of the “event”. The said event

could set the framework to establish whether tax should have been considered on the Deftologix shares with the consequent result in his professional opinion a more just and equitable distribution of the joint estate. Further, according to him, there are instances wherein the issue of financial statements recognises the ‘deferred tax’ that distinguishes the “accounting profit” from the “taxable profit” as calculated under tax laws. He pointed out that the Schedule to the Income Tax is silent and does not define divorce as a taxable event, thus from an accounting perspective an event that gives rise to an event is defined differently. His professional opinion in this matter is that a past event giving rise to a potential obligation does not necessarily entail an immediate obligation. This, therefore, means that the inclusion of tax consequences for other assets should also be the case with Deftologix Shares. The omission to do likewise and ignore a

past event that gives rise to a potential obligation would amount to failure to give a 'just and equitable account of the assets.

[26.5] Calculation of CGT

In calculating the Deftologic Shares, Mr Balkin pointed out that the loan account would not have attracted capital gains tax. He further contended as appears below, Mr H[...] taxation at the highest marginal rate represent the capital gains tax consequences of sale of shares at an assumed base cost of zero:

Sale Price R7 742 934

Base Cost RO

Capital Gain R7 742 934

Less: Annual Exclusion (already utilised) RO

Net Capital Gain R7 742 934

Inclusion Rate 40%

Capital Gain Included in Taxable Income R3 097 174

Tax (@ 45% highest rate) R1 393 728

[26.6] "Purchase of Practice Payment of \$400,000"

In his report, Mr Balkin reiterated that Mr H[...] believed the "Purchase of Practice Payment of \$400,000" was not "sufficiently" dealt with to his satisfaction. In response to this enquiry, as he pointed out, Mr Harcourt-Cooke was, guided by his experience, to determine what is "sufficient and appropriate evidence" as required of him by the Ethical Standards of the Accounting Bodies to which he belongs as well as the Fiduciary duty he owes to the Court. The receipt of service letters from Dr M[...] for Australian Tax Authorities with only 2016 marked as "Notice of Assessment made it difficult to determine what could have been considered as "sufficient and appropriate" in the circumstance due to his non-access to his full set of working

papers. However, according to his own experience and accounting literature, tax documents are of significance and a reliable source

of evidence and serve as the "gold standard" of verifying assessed documents. He pointed out that Mr Harcourt-Cooke, as a Court-appointed Referee was supposed to find a "Just and Equitable" settlement between the parties and that "sufficient

and appropriate evidence" was collected to their satisfaction. As much as Mr Harcourt-Cooke was not expected to fly to Australia, to question Dr M[...] as to the accuracy of her documentation, Mr H[...] would have been satisfied with the Tax Invoices and the

reconciliation of her full tax records and bank statements. He also acknowledged that Mr Harcourt-Cooke would have to be remunerated for the extra work and further, on becoming aware of the fee dispute between Mr Harcourt-Cooke and Mr H[...], he endeavoured to ensure the attainment of Mr H[...]'s agreement to settle part of Mr Harcourt-Cooke outstanding fees.

[27] Mr Balkin, in his overall conclusion, his professional opinion was an affirmation that if the pre- and post-tax assets were properly calculated (emphasis added) it will represent the parties' assets as appears below:

Value of Estates pre-Equalisation

Total Assets - A[...] per SHC Report: R14 209 159

Adjusted for CGT on Deftologix Shares -R1 393 728

R12 815 431

Total Assets - S[...] per SHC Report: R8 231 881

Total Joint Estate Adjusted for CGT on Deftologix Shares: R21 047 312

Division of Joint Estate @ 50%: R10 523 656

Amount due to S[...] to Equalise Estates

Amount Payable to S[...] per BB: R2 291 775

Amount Payable to S[...] per SHC: R2 988 639

Difference: R696 864

[28] Having presented the Expert's opinion on the complexity of this matter, cross-examination is a catalyst against which the credibility of the presented evidence is tested. I am persuaded by the Constitutional Court in *President of the Republic of South Africa v South African Rugby Union*[2] that endorsed the fundamentality of cross-examination and held:

"The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her

character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct," (emphasis added).

[29] In this case, I am not to make an intense analysis of the importance of cross-examination because it is integral to the legal processes as articulated by the Constitutional Court above. However, it is worth mentioning that the Defendant did not cross-examine Plaintiff's witness with Mr Thyne stating that he had "no questions for this witness". As the Plaintiff's Counsel

submitted, the non-cross-examination of Mr Thyne as an expert on taxation constituted what she referred to as the 'death knell' for the Defendant's claim as he also failed to ask any question of any of the Plaintiffs expert witnesses in respect of his claim. According to her, Defendant's non-cross examination which was supplemented by his own representation had put a bar on being cross-examined and that constituted a "fatal blow" to his non-existent defence of the demand against him. I do not have to draw any inference against the Defendant who acted within his right not to cross-examine Mr Thyne. Thus, it was also important for the weighing of evidence that will enable the advancement of the principles relating to cross-examination and their contribution to the broader framework of the legal processes. Therefore, the above evidence brings this Court to the question of how the parties have fared in their arguments as a final presented opportunity before the judgment is handed down?

The closing arguments

[30] The Plaintiff's Counsel in her closing arguments, without reproducing the evidence, submitted that the Plaintiff discharged her onus and proved her claim being, first, the joint estate and agreed appointment of Mr Harcourt Cooke as a Forensic Expert charged with the valuation of the parties' respective assets and liabilities as at the date of divorce being 07 March 2029 with the report being provided on 31 October 2020. Secondly, she is entitled to payment from the Defendant of the sum of R2 988 639.00 with interest from the date of demand. Thirdly, to an order terminating the parties' joint ownership in the timeshare units and further relief thereto. Lastly, her entitlement to payment to her by the Defendant of the sum of R57 813.00 being 50% of the amount paid by her in respect of the timeshare levies from 2019 to 2025.

[31] Similarly, the Defendant in his closing argument continued to dispute the claim against him and rejected the elevation of Mr Harcourt-Cooke's Final Report as an order of court. According to him, the said Report was patently false and the absence of evidence to support this imparts no credence to the Plaintiff's entire case. He further submitted that the unprofessional conduct of mainly the Plaintiff's Senior Counsel, as well as that of the Plaintiff, and to a lesser degree that of Ms Shardlow deserves the Court's attention and possible formal sanction. In addition, the 'Writ of Execution' was settled fully and used to discredit him by being provided by this Honourable Court with a response that befits Plaintiff's misadventure. He alleged that Mr Harcourt-Cooke

was compromised as the court-appointed forensic expert which then needed to be verified, and an appropriate response be directed by the Honourable Court to him. Greg Beech's evaluation of Deftologix not taking into consideration, is a registered Level 1BBBEE company, and that capital gains tax is to be applied. Further, Mr Beech is tasked to engage his expert Mr. Balkin to address this matter and present the court with their final evaluation. Outstanding shareholder payments from Capital Radiology is to be settled as a matter of accuracy in accountancy terms. Payment of Goodwill by Queensland Diagnostic Imaging to be also settled as a matter of accuracy in accountancy terms. Plaintiff's reckless actions in respect of her payment of R1m gift to her

brother is included as an asset in her schedule. The outstanding remuneration from Queensland Diagnostic Imaging be verified and is included in the Plaintiff's schedule as an asset. His proposed estimation was for the retention of the proceeds of sale of property in Umdloti to be disbursed and interest charged at the statutory rate of 9.2% as a punitive decision by this Honourable Court, and for this Court to issue a separate Order. He also filed his plea reserving his rights to recover costs with a proviso that this Court will issue an appropriate and fair Order. He concluded his submission for the right to be done when the final estimation of the joint estate is made because there were no winners and losers and a need exists for them to reach a point of settlement

and move on with their lives peacefully.

Legal framework

[32] In the South African context, the marriage law relating to the proprietary consequences of the marriage on divorce is regulated by the Divorce Act 70 of 1979 as amended. The Divorce Act has its foundation on the Civil Marriage Act of 1961 which regulates civil marriage between the parties. This Act becomes important in this case in that the parties were married in community of property. The said status entails the sharing of the joint assets during the substances of the marriage. It is therefore on divorce that the relationship between the said Act and the Divorce Act come into play in that the former Act is the determinant of the type of marriage which will then serve as a framework on the proprietary consequences of the marriage as envisaged in the Divorce Act. For purposes of this case, this Court will confine itself to the Divorce Act because of its application to the matter at hand. Further, the intention is not to make an extensive analysis of the said framework but to confine this judgment to the specific effects on its regulation of marriage on divorce.

[33] The Divorce Act is important in that it is explicit on what is to be done relating to the division of the joint estate. Therefore, the

determination

of the division of the joint estate is prescribed in section 7 of the Divorce Act which reads as follows:

- (1) A court granting a decree of divorce may in accordance with a written agreement between the parties make an order [regarding] the division of the assets of the parties or the payment of maintenance by the one party to the other.

The consequent result of the core content of the division is captured in subsection 7 which also provides:

- (a) “in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, [...], be deemed to be part of his assets.

- (b) The amount deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce:
 - (i) was paid over or awarded to another party; or
 - (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.
- (c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.”

And further, sub-section 7 is interlinked with sub-section 8(a) which provides:

- (i) “any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member.”

[34] It is in this regard that section 1 of the Divorce Act defines the ‘pension interest in relation to a party to a divorce action as applicable to “a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office.” Simply put, the entitlement to a “pension interest” is only applicable

when the party who is a member of the pension fund would have been entitled to the benefit at the date of divorce. However, the Pension Funds Amendment Act 11 of 2007 concretises this position and brings more clarity in it. The Amendment Act in section 28(e) provides that the “Divorce Act read together with the Pension Fund Act entails the entitlement to a pension benefit that accrues to a member at the date of the court order”.

[35] It is my considered view that for the purposes of this case there is an interplay between the application of the Divorce Act; Pension Fund Act and the Income Tax Act 58 of 1962. These pieces of legislation are a direct framework for the division of the estate dealing with the intricacies and complexities relating to the way the consequences of marriage should be regulated. Particularly for this case, because, without an analysis in this section, the Plaintiff relied on experts that dealt and provided an insight before this Court on how the matter at hand was affected by the underlying principles relating to Pension and Taxation principles. Of further importance in this case was that it was also not a claim for pension interest that arose because of the division of joint estate on divorce. The claim was on the outcome of the valuation of the net value of assets as at date of divorce which entailed the entitlement of the Plaintiff to the amount due on division of the net assets at divorce. I do not intend to exhaust the legal framework but to move on to the gist of this case.

Discussion

- [36] This section will confine itself to the core content of the argument in this matter regarding the payment of the amount due to the Plaintiff by the Defendant. The rationale behind such confinement is the importance and presentation of the Report by Mr Harcourt Cook relating to the division of the joint estate as assessed at date of divorce: 07 March 2019. As simply given effect by Advocate Nathan that the date of divorce serves as a determinant of the value of the gross value of the joint estate. Mr Harcourt-Cooke's mandate further showed that the consolidation of the parties' estate was effected from the date of divorce. In essence, the assets that were disposed of before the date of divorce do not form part of the joint estate. Mr Thyne further concretised the non-inclusion of the pre-disposed assets with the post-divorce assets. He pointed out that the latter are not subject to tax liability because such an engagement will amount to nothing more than speculation because of the taxation rates that do not remain stagnant. This means that the value of the pre-disposed assets would have to be linked with the post-divorce assets and be put in the same basket with the existing value on the date of divorce and be subject to taxation.
- [37] However, it is trite to mention that it is common cause that the divorce was settled on 07 March 2019 with an agreed settlement that was made an order of Court. It is also common cause that the type of marriage in community of property that regulated the proprietary consequences of their marriage meant that they were co-owners of the joint estate. They both had an undivided share and liability as at the conclusion and during the subsistence of the marriage. Therefore, the substance of this case was the implications of the outcome of the assessment of the net assets at date of divorce regarding the division of the estate with reference to the payment of R2 988 639.00 (two million nine hundred and eighty-eight thousand six hundred and thirty-nine) that was due to be paid by the Defendant to the Plaintiff.
- [38] The parties having married in community of property with equal shares and responsibilities, section 1 of the Matrimonial Property Act defines a joint estate as meaning a 'joint estate of a husband and a wife married in community of property'. Moshwana J in *Van Der Merwe v Basson*[3] characterised the joint estate as 'comprising of all assets that a spouse acquired prior to the marriage as well as those assets accumulated during the marriage'. However, on divorce, the joint estate is no longer in existence which meant that the joint ownership and responsibilities were no longer the subject of the dispute. Simply put, the joint ownership died with divorce and there is no liability from a non-existent estate.
- [39] Accordingly, the Defendant misplaced his argument about the inconsistent calculation of the net of the joint estate at date of divorce. It is my opinion that the Plaintiff's demand for payment was not because of a future payment after divorce. The demand was not payment of the portion of the pension interests assigned to a non-member spouse wherein section 37D(4)(a) of the Pension Funds Act stipulates that for purposes of sections 7(8)(a) of the Divorce Act:

- [1] [2019] ZASCA 78.
- [2] 1999(10) BCLR 1059 (CC) at para 61.
- [3] (2019/39063)
- [2024] ZAGPHC 659 at para 11.
- [4][4](714/2018)
- [2019] ZASCA 185 (3 December 2019).
- [5] 2012
- (6) BCLR 599 (CC) at para 6.
- [6] (20665/2021
- [2023] ZAGPPHC 30) 24 January 2023 at para 8.
- [7] 2011] 4 All SA 1 (SCA) at para 11.
- [8] 2004
- (5) SA 373 (C) at para 19.
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