

SOUTH AFRICA / JUDGMENT

Swartz v K and Another

(A5036/2021; 2015/8456) [2021]

ZAGPJHC 816 (15 December 2021)

[2021] ZAGPJHC 816

COURT

South Gauteng High Court, Johannesburg

BEFORE

Francis, Senyatsi, Khumalo

CASE / FILE NUMBER

A5036/2021; 2015/8456

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO: A5036/2021

COURT

A QUO CASE NO: 2015/8456

REPORTABLE: NO
OF
INTEREST TO OTHER JUDGES: NO

REVISED: YES

Date: 15 December 2021
In

the matter between:

SWARTZ: MERVYN ISRAEL N.O.
Appellant
and
K[....]:
HJ
First Respondent
K[....]:
SW
Second Respondent

Coram: Francis J, Senyatsi J and Khumalo AJ

Heard: 18 October 2021

Delivered: 15 December
2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, and by being uploaded to the CaseLines digital system of the GLD. The date and time for hand-down is deemed to be 12:00 on 15 December 2021

JUDGMENT

Khumalo AJ (Francis J and Senyatsi J concurring):

INTRODUCTION

[1]. This case illustrates the problems that can arise when divorce orders do not fully and finally settle the proprietary issues flowing from the termination of a marriage between former spouses. In this case, the divorce order left to the receiver and liquidator appointed by the Court in terms of the divorce order to divide the assets in the joint estate equally between the parties to the divorce.[1]

[2]. The First Respondent and her former husband the Second Respondent were divorced on 26 February 2016. The divorce order dissolving the marriage provided at paragraph [1] that the marriage between the parties is dissolved. It provided at paragraph [2] that Mr. Mervyn Israel Swartz (Appellant in this appeal) is appointed as receiver and

liquidator to divide the joint estate of the parties and that he is granted the powers set out in Annexure “A” to the divorce order.

[3]. The powers granted to the Appellant in terms of the Annexure to the divorce order included inter alia: to realise, distribute and/or divide all the assets of the joint estate as at the date of divorce, including but not limited to movable and immovable assets; to accumulate details of all the assets and liabilities of the joint estate; to compile a full inventory of all the assets of the joint estate; to submit, on completion of his duties, a full report of his investigations to both parties; to distribute the nett assets of the joint estate between the First and Second Respondent and/or to

sell the nett-assets of the joint estate either by public auction or private treaty whichever shall yield the greater benefit to the joint estate and thereupon divide the nett-proceeds equally between the parties; to engage the services of a suitably qualified person to assist him in determining the proper value of any assets of the joint estate and to pay such person reasonable fees which may be charged by him; and to apply to the Court on notice to the First and Second Respondent for further directions as he may consider necessary to institute proceedings against any person for the delivery to him of any assets in the joint estate.

[4]. The only provision for the Appellant's costs was made in clause 1.21 of Annexure A, which provides, without more, that the costs of the liquidator are to be paid by the joint estate. The clause is

silent on the rate or the fee scale at which the Appellant was to be remunerated.

[5]. Two disputes arose between the First Respondent and the Appellant after the Appellant had finalised and submitted his liquidation and distribution account ("final report") to the Respondents.

The first concerned the rate and scale at which the Appellant was to be remunerated by the joint estate. The second concerned the amount to be distributed to the First Respondent as part of her share of the joint estate. The two issues formed the basis of the judgment of the Court a quo and are the subject matter of this appeal.

PROCEEDINGS IN THE COURT A QUO

[6]. The First Respondent launched application proceedings in the Court a quo in which she sought a declarator to the effect that the Appellant is only entitled to be remunerated on a reasonable basis for the actual work performed and not at the scale set out in the Second Schedule to the Insolvency Act (Act 24 of 1936) as contended

by the Appellant. The First Respondent also sought an order directing the Appellant to realise as many of the assets of the joint estate as may be necessary to enable the Appellant to pay her an amount of R 2 421 081. 05, which is the amount she contended was due to her in accordance with the Appellant's final report which had been accepted by the Respondents.

[7]. The Second Respondent was cited as a respondent in the application although no relief was sought against him directly. It should be pointed out that the effect of monetary relief being granted in favour of the First Respondent would be that a portion of the assets in possession of the Second Respondent would have to be realised so

that a payment can be made to the First Respondent. The Second Respondent was therefore correctly joined in the proceedings although

he did not file any affidavits supporting or opposing the relief sought by the First Respondent.

[8]. Between the date when the application was launched and the date when the application was argued, the Appellant made a payment of R 1 488 582.71 to the First Respondent, which according to the First Respondent still left the balance of R 940 498. 34 outstanding.

[9]. On 17 December 2019, the Court a quo, per Foulkes-Jones AJ (who sadly passed away in early 2021) granted the following orders in favour of the First Respondent:

“[9] I accordingly make the following order:

1. The first respondent (Appellant in this appeal) is not entitled to be paid fees calculated in accordance with the provisions of Tariff B Second Schedule of the Insolvency Act number 24 of 1936.
2. The first respondent's fees shall be calculated on the basis of the reasonableness of the fees for the actual work performed by him as a receiver and liquidator in terms of the Court Order.
3. The first respondent is to render an account to the joint estate by providing same to the applicant (First Respondent in this appeal) and second respondent within one month of date of this order, the account

is to be duly supported by vouchers.

4. The joint estate shall pay the respondent's fees calculated on the basis set out above. Such fees shall be a first charge against the joint estate.
5. The first respondent shall within one month of date hereof realize so many of the assets of the joint estate as may be necessary to enable him to effect payment of the amount due to the applicant namely the

amount of R 940, 498. 34 adjusted to reflect 50% of any change in the amount due by the joint estate to the first respondent but currently unpaid for payment of his fees and charges.

6. ...”

[10]. It is against these orders that the Appellant appeals to this full court, leave having been previously refused by the Court a quo but subsequently granted on petition to the Supreme Court of Appeal.

ISSUES

IN THIS APPEAL

[11]. The issues in this appeal are the following: (i) What is the rate and scale at which the Appellant's fees were to be determined; and (ii) What is the amount due to the First Respondent in accordance with the Appellant's final report.

THE FEES QUESTION

[12]. It is common cause that the Appellant was appointed in terms of the divorce order.

[13]. Since the divorce order did not determine the rate and scale at which the Appellant's fees as the receiver and liquidator of the joint estate were to be determined, the rate and scale of the fees could only be determined according to the agreement between the Appellant and the Respondents and in the absence thereof, on the basis of the reasonableness thereof.

[14]. In her founding affidavit at paragraphs 14 and 61, the First Respondent alleged that the divorce order did not make provision for payment of fees on the scale contended for by the Appellant and she never mandated the attorney representing her in the divorce (her former attorney) to enter into such an agreement with the Appellant. She further states that her former attorney was not even present on the date when the divorce order was granted and the Appellant was appointed.

[15]. It is a rule of our law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction.[2] A principal can of course be estopped from disputing the agent's authority, but that issue does not arise here.

[16]. I accept that, assuming that the existence of an agreement has been established, the party disputing authority bears the onus in relation to that issue.[3]

[17]. In his answering affidavit, the Appellant did not respond (directly or indirectly) to the allegations in paragraphs 14 and 61 of the founding affidavit. The allegations in paragraphs 14 and 61 of the First Respondent's founding affidavit are therefore undisputed and are taken to be admitted.

[18]. Our Courts have long adopted the approach that if the respondent's affidavit in answer to the applicant's founding affidavit fails to admit or deny, or confess and avoid, allegations in the applicant's founding affidavit, the Court will, for the purposes of the application, accept the applicant's allegations as correct.[4]

[19]. I fully associate myself with the following statement by Masuku J of the Namibia High Court in *Beuke v The Namibia Employers' Association and Others Media* where the learned judge said: [5]

"[25] The purpose of an answering affidavit in motion proceedings is to respond squarely to the facts contained in the founding affidavit. A litigant is duty bound in his or her answering affidavit, to address each and every allegation of fact contained in the founding affidavit which such litigant ought to be able to answer. The effect of not addressing an allegation of fact is that the court must accept that such allegation is admitted."[6]

[20]. Since the First Respondent's allegations on the issue of authority are admitted, there is no dispute of fact on the issue. If there was, the *Plascon-Evans* rule would apply.[7]

[21]. The conclusion that the Appellant has admitted the allegation that the First Respondent's former attorney did not have authority to enter into a fee agreement with the Appellant would be sufficient to find for the First Respondent on the fees issue.

[22]. I proceed to deal with the version of the agreement as presented by the Appellant for completeness.

[23]. In his answering affidavit, the Appellant states that at the time of his appointment on 26 February 2016 his fee structure was already known to the First Respondent's then attorney because shortly before his appointment as receiver and liquidator in this matter he had been appointed as receiver and liquidator in another matter in which the First Respondent's former attorney acted. The Appellant has attached to his answering affidavit a letter that he says he sent to the First Respondent's then attorneys in respect of the fees in that other matter (and not this one) which is dated 4 February 2016 (Annexure MIS-1).

[24]. Curiously, the Appellant does not attach any letter addressed to the First Respondent's former attorney in respect of this matter or any letter that the First Respondent's former attorney sent to him. One would have expected that if such letters were sent, they would be attached to his answering affidavit, instead of a letter that relates to proceedings that do not involve the parties in this matter.

[25]. Based on the 4 February 2016 letter, the Appellant states in paragraph 10 of his answering affidavit that it was so obvious to him that his fees basis was clearly understood by all parties concerned that he saw no need at the time to confirm the calculation of his fees in writing to either the First or the Second Respondent's attorney. This is despite the fact that on his version he spent two hours with the First and Second Respondent individually immediately after his appointment.

[26]. In short, the Appellant never communicated his fee basis with either the First or the Second Respondent. He assumed that based on his prior appointment by the First Respondent's former attorney in a different matter that the same arrangement as in the other matter would apply.

[27]. Unfortunately for the Appellant, his assumption does not and cannot give rise to an agreement. It certainly cannot bind the First and Second Respondent who had nothing to do with the Appellant's prior arrangements with the First Respondent's former attorneys in an unrelated matter.

[28]. The Appellant's contention that he concluded an agreement with the First Respondent represented by her former attorneys is therefore undermined by his own affidavit where he states that he saw no need to confirm his fees in this case as he assumed that his fees will be determined in accordance with prior arrangements in other unrelated matters.

[29]. The Appellant does not even say that he actually discussed his fees in this matter with the First Respondent's former attorney. He simply says that there was an agreement with the First Respondent's former attorney prior to his appointment. He does not even say when (date), where (place) and how (orally, in writing or by conduct) the agreement was concluded.

[30]. He can do no more than say that he assumed that the prior arrangement applied. It is obvious that such prior arrangement was not known to the Respondents – and the Appellant has not suggested otherwise

- and thus could not bind them.

[31]. The Appellant also says that the First Respondent's attorney recommended him for appointment but did not herself appoint him. It is therefore not clear how the former attorney could have agreed the terms of his appointment with the Appellant if the former attorney simply recommended him to the parties but did not appoint him.

[32]. The Appellant then refers to emails exchanged with the First Respondent in July 2016 during which he mentioned his fees. On his version, an agreement had already been concluded by the time these emails were sent. The emails can therefore not constitute the agreement on fees.

[33]. The Appellant contends that the First Respondent's failure to object to that aspect of his email that mentioned his fees amounted to confirmation of his agreement with the First Respondent's former attorney.

[34]. This contention by the Appellant does not cure the issue of authority which the Appellant did not address. Secondly, this contention does not help the Appellant since he cannot point to any agreement between himself and both Respondents. Since the joint estate is liable for the Appellant's fees, both Respondents had to agree to the fees.[8] On his version, the Appellant saw no need to discuss the fees with the Second Respondent's attorney so he could not have concluded an agreement with the Second Respondent.

[35]. In any event, the Appellant has known since at least 5 April 2017 that the First Respondent disputed the existence of an agreement on fees. This was made clear to him at the meeting attended by the First Respondent's new attorneys.

[36]. Accordingly, I find that there was no agreement between the Appellant on the one hand, and the Respondents on the other, in terms whereof it was agreed that the Appellant would be remunerated in accordance with the tariff in the Second Schedule to the Insolvency Act.

[37]. I therefore find that the Court a quo was correct in holding that the Appellant's fees shall be calculated on the basis of the reasonableness of the fees for the actual work performed by him as a receiver and liquidator in terms of the divorce order.

AMOUNT DUE TO THE FIRST RESPONDENT

[38]. In the Court a quo, the First Respondent sought to enforce against the Appellant a payment obligation arising from the agreed final report prepared by the Appellant in his capacity as receiver and liquidator of the joint estate.

[39]. She stated her case as follows in the founding affidavit:

“On 11 October 2017 he (Appellant) issued his supplementary report and advised both of us (First and Second Respondent) of the amount available for distribution, which we both accepted.

To date hereof, I have been attempting without success to procure payment from the First Respondent (now Appellant) of the agreed amount and notwithstanding his duty and obligation in terms of the court order, he has failed to realise the necessary assets in order to pay me my share. ...

Accordingly, I have been left with no choice by the First Respondent (now Appellant) but to seek the assistance of this Honourable Court with regard to the payment to me of my share of the joint estate.”

[40]. I should mention that neither the Appellant nor the Second Respondent disputed the allegation that the report had been agreed. This fact is therefore accepted as common cause.

[41]. In his final report styled “supplementary report”[9] and dated 17 October 2017 and annexed as HK4 to the First Respondent’s founding affidavit, the Appellant states as follows:

“S[...] (Second Respondent) has indicated to me that he does not wish to realise or convert into cash any of his Pension Funds and will source the necessary monies with which to pay Heidi (First Respondent) what is due to her.

In the circumstances I have prepared my accounting on the basis that S[...] will have to pay Heidi an amount of R 1 432 316. 75 and transfer an amount of R988 764. 30 to a Pension Fund of her choice, this in terms of Heidi’s request. My costs and disbursements will have to be paid in cash.”

[42]. The two amounts (R 1 432 316. 75 plus R 988 764. 30) together make up the R 2 421 081.05 claimed by the First Respondent in the Court a quo. There is no suggestion in the Appellant’s final report that the Second Respondent will pay anything less than this amount. There is also no suggestion that the First Respondent is entitled to less.

[43]. After setting out the assets and liabilities of the joint estate, the Appellant’s final report determined that the “NET AVAILABLE FOR DISTRIBUTION” was R 13 653 660. 67.

[44]. In the section of the final report titled “Reconciliation”, the Appellant’s final report states:

“Heidi to receive

R 2 421 081.05.”[10]

[45]. I accept, as the Appellant contended, that his earlier report (Annexure HK3) and supplementary report (Annexure HK4) must be read together. The simple reason for this is that HK4 supplements HK3. HK4 says so expressly. Having said that, it is in the supplementary report that “final accounting by liquidator in respect of allocation and sale of assets” is contained. It is also the supplementary report that sets out the final amount that should be paid to the First Respondent and it is to that report where one must look for the answer to the second question in this appeal.

[46]. The Appellant made it clear in his supplementary report that he prepared his accounting on the basis that the Second Respondent will have to pay the First Respondent an amount of R 1 432 316. 75 and transfer an amount of R988

764. 30 to a pension fund of her choice. There can thus be no doubt that the Second Respondent was required to pay an amount of R 2 421 081.05 to the First Respondent.

[47]. As it turned out, and notwithstanding the contents of the supplementary report, the Second Respondent elected to cash out a portion of his member’s share in a preservation fund to make a payment to the First Respondent. Instead of withdrawing the full R 2 421 081.05 in order to make payment to the First Respondent, the Second Respondent only withdrew R 2 078 646. 22. The Court was not favoured with details of the withdrawal, but it appears that the R 2 078 646.22 is the net amount received by the Second Respondent from his preservation fund after tax was deducted.

[48]. Since all the parties were bound by the Appellant’s final report, which states clearly that it was prepared on the basis that the Second Respondent will pay R 2 421 081.05 to the First Respondent, the fact that the Second Respondent elected to source the funds from his preservation fund should not affect the rights of the First Respondent. She remains entitled to the amount set out in the final report.

[49]. It can therefore not avail the Appellant to now say that the First Respondent is entitled to a lesser amount, or that she should be liable for the Second Respondent’s share of the tax on his preservation fund.[11]

[50]. The contention by the Appellant that the entire joint estate has been realised and distributed, is equally without merit. It is clear from Annexure A to the divorce order that the joint estate referred to therein is the joint estate as at the date of divorce. The Appellant has not realised and distributed the pension funds mentioned in his report.

[51]. All these problems could have been avoided if the Respondents initially or the Appellant subsequent to his appointment in accordance with the powers vested in him by Annexure A to the divorce order had approached a Court to divide the pension benefits.

[52]. I am reminded of the remarks by the SCA in *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) SA 373 (SCA) at para 26 where it said:

“[26] This case cogently illustrates the importance of deeds of settlement and divorce orders relating to pension interests being formulated very carefully indeed in order to ensure that they fall within the ambit of ss 7(7) and 7(8) of the Act. If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way”

[53]. In *GN v JN* 2017 (1) SA 342 (SCA) at para 27, the SCA said:

“[27] Section 7(8), on the other hand, creates a mechanism in terms of which the pension fund of the member spouse is statutorily bound to effect payment of that portion of the pension interest (as at the date of divorce) directly to the non-member spouse as provided for in s 37D(1)(d)(i) of the Pension Funds Act 24 of 1956 and s 21(1) of the Government Pension Law, 1996. This is as far as s 7(8) goes and no further. The non-member spouse is thereby relieved of the duty to look to the member spouse for the payment of his or her share of the pension interest with all its attendant risks.”

[54]. This is a case where section 7(8) of the Divorce Act read with section 37D of the Pension Funds Act 24 of 1956 were not invoked. Accordingly, the First Respondent was entitled to look to the Second Respondent for payment and she did. How the Second Respondent was to source the funds to pay the First Respondent was up to him.

[55]. The other consequence is that the tax provisions that apply when a non-member spouse claims directly from a pension fund in terms of section 37D of the Pension Funds Act do not apply.[12]

[56]. Accordingly, I find that the First Respondent is entitled to receive the amount set out in the supplementary report, minus her share of the Appellant’s fees as set out in the Court a quo’s order. The Appellant is also not entitled to deduct all his fees from the First Respondent’s share, as he seems to have been

imputing.

[57]. The consequence of the above findings is that the Appellant’s appeal must fail. For avoidance of any doubt, the costs are to be paid by the Appellant personally and not by the joint estate despite the fact that the Appellant was cited in his official capacity. These costs are to include the costs associated with the application for leave to appeal to the SCA.

Order

In the result, I propose the following order.

(1) The Appellant’s appeal is dismissed with costs.

S KHUMALO

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree and it is so ordered

FRANCIS J

Judge of the High Court

SENYATSI J

HEARD ON:

18 October 2021 – via Microsoft Teams

JUDGMENT

DATE:

15 December 2021 - judgment handed down electronically

FOR THE APPELLANT:

Adv C Woodrow SC (heads of argument prepared by CHJ Badenhorst SC and JA Booyse)

INSTRUCTED BY:

K H Lang Attorneys, Observatory, Johannesburg

FOR THE RESPONDENT:

Adv W Davel

INSTRUCTED BY:

Sian Richardson Attorneys, Johannesburg

- [1] The assets in the joint estate include the parties pension interest in their respective pension funds. This is so even if the Court granting the decree of divorce did not make an order dividing the pension interest of the parties. see, s1 and 7(7) of Divorce Act 70 of 1979; N v N 2017 (1) SA 342 (SCA) paras [25] and [26].
- [2] MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another 2010 (4) SA 122 (SCA) at p127 para [7].
- [3] Moraitis Investments (Pty) Ltd and others v Montic Dairy (Pty) LTD 2017 (5) SA 508 (SCA) at p519 para [21].
- [4] See, Moosa v Knox 1949 (3) SA 327 (N) at 331; United Methodist Church of South Africa v Sekufundamala 1989 (4) 1055 (O) at 1059A.
- [5] Neutral citation [2019] NAHCMD 227 (4 July 2019).
- [6] See generally, Wightman t/a JW Construction v Headfour (Pty) Ltd and Another [2008] ZASCA 6; 2008 (3) SA 371 (SCA) ([2008] 2 All SA 512) paras 12 and 13; Naidoo and another v Matlala NO and others 2012 (1) SA 143 (GNP) at p150 – 151.

- [7] See, *Moraitis Investments supra*, at p520 para [214], where Wallis JA said: “ ... He said that Mr Moraitis should be held to this warranty and that 'his denial of authority (such as it is) must be rejected'. Earlier he said that the assertion that Mr Moraitis was not authorised to represent the Moraitis Trust was 'false and unsubstantiated and should be rejected'. In the light of that unequivocal statement it is hard to see on what basis it could be contended that it was undisputed that Mr Moraitis lacked authority to represent the Moraitis Trust. The real question was whether there was a bona fide dispute about his authority. If there were, in the absence of a reference to oral evidence, which was not sought, the appellants would have failed to discharge the onus. This was because the application of the Plascon-Evans rule meant that the case had to be determined on the version of the respondents.”
- [7] See, *Moraitis Investments supra*, at p520 para [214], where Wallis JA said:
- “ ... He said that Mr Moraitis should be held to this warranty and that 'his denial of authority (such as it is) must be rejected'. Earlier he said that the assertion that Mr Moraitis was not authorised to represent the Moraitis Trust was 'false and unsubstantiated and should be rejected'. In the light of that unequivocal statement it is hard to see on what basis it could be contended that it was undisputed that Mr Moraitis lacked authority to represent the Moraitis Trust. The real question was whether there was a bona fide dispute about his authority. If there were, in the absence of a reference to oral evidence, which was not sought, the appellants would have failed to discharge the onus. This was because the application of the Plascon-Evans rule meant that the case had to be determined on the version of the respondents.”*
- [8] According to section 1 of the Matrimonial Property Act 88 of 1984, the “joint estate' means the joint estate of a husband and a wife married in community of property.
- [9] I will henceforth use final report and supplementary report interchangeably when context requires. They are the same document.
- [10] Heidi is the First Respondent in this appeal and the Applicant in the Court a quo.
- [11] For the same reason that the First Respondent would not have been liable for interest on a loan if the Second Respondent had elected to take out a bank loan to pay what is due to the First Respondent. The R 2.4 million is the Second Respondent's liability to the First Respondent, it is not a joint liability or the joint estate's liability.
- [12] See, Paragraph 2B of the Second Schedule to the Income Tax Act. See such cases as *Fourie v Eskom Pension and Provident Fund* (18/1355)
- [2019] ZAGPJHC 188 (6 June 2019); *Russow v Reid and another* 2011 3 All SA 106 (GSJ).

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