

SOUTH AFRICA / JUDGMENT

TP v DN (21859/2021) [2022] ZAGPJHC 64 (1 February 2022) [2022] ZAGPJHC 64

COURT

South Gauteng High Court, Johannesburg

BEFORE

S Mahomed

CASE / FILE NUMBER

21859/2021

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL
DIVISION, JOHANNESBURG

Case

No. 21859/2021

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Date:

07/02/2022

IN

THE APPLICATION BETWEEN

T[....]

P[....]

Applicant

and

D[....]

N[....]

Respondent

JUDGMENT

MAHOMED AJ,

INTRODUCTION

1. This is an application for the appointment of a liquidator to sell immovable property which the parties purchased together and is the only asset in their partnership. The application is for the dissolution of a partnership. The parties are married out of community of property with accruals. The applicant seeks an order for the appointment of Ms Symes as liquidator to sell the property and manage debts of the partnership. The respondent brings a counterapplication for the division of a joint estate and the appointment of an independent liquidator to be appointed by the Chairman of the Johannesburg Society of Advocates who must sell the property that the parties own jointly.
2. The parties are in an acrimonious relationship, and they cannot agree on the price or person/s who should sell the only asset in the partnership.
3. It is common cause that the applicant services the bond and levies on the property. The parties agree that the property is to be sold however they are deeply divided on the price it is to be sold for and the person appointed to sell the property. This dispute has been ongoing for a long while therefore the termination of this partnership will benefit both parties.
4. The applicant has paid toward the bond throughout their marriage, whilst the respondent, it is alleged, takes no responsibility for the property, and suffers no inconvenience for as long as the bond is in place. The respondent was to pay the levies and insurance costs on the property; however, he has abandoned this duty along the way. The evidence is that he has no incentive to expedite the finalisation of this matter and has been obstructive in finalising the sale.
5. Furthermore, the parties cannot agree on the appointment of a liquidator, as they distrust one another and therefore any appointments of a liquidator, made by the other.

THE EVIDENCE

6. Mr Janeke appeared for the applicant and submitted that the parties owned the property jointly in a partnership and the division of the proceeds must be managed according to the principles of partnership.
7. He submitted that the residue (profit) from the sale of the property should be divided by reference to whichever of the parties paid more than their 50% toward the property.

8. The applicant has identified a Ms Symes, to act as liquidator, whom counsel confirms is available to act if appointed. Mr Janeke submitted that a delay in the appointment further burdens the applicant. He alleged Ms Symes has worked in the field and is qualified to act as such.
9. Mr Janeke further submitted that the liquidator shall have all the normal powers to act as has been confirmed in various cases in our courts. See: *MILLS v MILLS SAFLII 2008 ZAWCHC 121, S v S 2018 (6) SA 528 WCC 27 JUNE 2018*, including the power to obtain the best price for the property and the power to adjust amounts due according to their respective contributions above their 50% obligations in terms of the partnership.
10. Mr Janeke submitted further that the disbursements costs must be ordered to be paid from the respondent's adjusted share. In amplification thereof,
 - 10.1. He submitted that the property has grown in value as the bond is reduced, entirely by the applicants paying for this bond.
 - 10.2. It was not disputed that the respondent "colluded" with a potential buyer to set the purchase price.
 - 10.3. Furthermore, Mr Janeke proffered that the respondent was obstructive when he insisted on unrealistic commissions charges by agents, who were unable to meet his demands, and the property remains the applicant's responsibility and is still to be sold. The applicant has been frustrated in her attempts to sell the property and has simply given up in her search for a buyer.
11. The respondent's version is that the parties had agreed that the applicant would pay the bond and he would pay for the levies and insurances on the property. Based on those terms the applicant received a higher salary from the family business and he, the respondent drew a lower amount, with the difference in salary having been factored in to ensure equal contributions.
12. The evidence is that the applicant has been obstructive in settling on a sale price. It was not disputed that the applicant turned down offers for higher amounts that were put to her for approval. Counsel for the respondent, Ms Rambachan -Naidoo, submitted that the applicant failed and refused to make a reasonable sound business decision, during what can be easily called "a buyer's market."
13. Furthermore, it was submitted on behalf of the respondent, that the applicant failed to disclose to him that she had leased the property and collected rentals, which she had made payable into her mother's account. This diverting of income due to the partnership was not disputed. The respondent is of the view that the applicant cannot be trusted to make the best decisions for their joint estate.

14. The respondent submitted that he has lost his faith in applicant and therefore cannot agree to her choice of liquidator. The respondent prays for an order wherein the Chairman of the Johannesburg Society of Advocates should appoint a liquidator.

14.1. In this regard I was referred to the case of *M v M* 82156/14 [2017] ZAGPPHC 1080. 2018 (3) SA 225 GP (20 November 2017), where the court held that given the level of distrust between the parties and the risk of bias, an independent body is to appoint the liquidator.

15. Counsel for the respondent submitted that the parties, although married out of community of property, with the accruals to apply, shared a “joint estate.” It was submitted that there should be an equal division of the profits from the proceeds of the sale and the accrual can only be determined upon dissolution of the marriage in terms of the provisions of the Matrimonial Property Act 88 of 1984.
16. The parties are clearly in an acrimonious relationship to a point where they act to their prejudice.

THE MATRIMONIAL PROPERTY

17. The parties each agreed to contribute toward the purchase of their property for a profit and it was a lawful agreement. These are the essentialia of a partnership. They effectively purchased property within a partnership arrangement. Their marital regime does not accommodate a joint estate, as was submitted by counsel for the respondent, but a commercial partnership.
18. The Matrimonial Property Act 84 of 1988 defines “joint estate” as
“the joint estate of a husband and a wife married in community of property.”
19. The parties in casu are married in terms of an antenuptial contract with accruals. I agree with counsel for the applicant they do not share a joint estate within the meaning of this Act.
20. It is common cause that the partnership must be dissolved, and the property sold to realise a benefit to them both. The property is their former marital home and is currently vacant.
21. The evidence is that one party contributed more than the other and therefor an adjustment to reflect their percentage contributions is the only just and fair method to calculate their ultimate profits from the sale.
22. In *ROBSON v THERON* 1978 (1) SA 841 A, the court stated that for purposes of distribution of the partnership assets an account must be drawn up to determine what each partner “owed the partnership” and thereafter determine what is due to each partner by that partnership.

APPOINTMENT OF LIQUIDATOR

23. Given the level of acrimony and distrust between the parties, it would serve them best to ensure an unbiased and reliable means to dispose of their partnership asset.

24. The decision in *M v M*, supra, is instructive and against the conspectus of the evidence before me, I am of the view that it is appropriate in the circumstances to order that the Chairman of the Johannesburg Society of Advocates, be called upon to appoint an independent liquidator in this matter, on behalf of the parties.

COSTS

25. Counsels made submissions on the issue of who is to pay costs of the liquidation and the reasons they proffered were based on the behaviour and attitude of the other party in this matter.
26. In my view both parties were equally responsible for the slow pace and unnecessarily convoluted path that this simple matter was dragged along.
- 26.1. Accordingly, I am of the view that each party is to share equally the cost of the dissolution of the partnership and the sale of this property.
- 26.2. There is only one asset to realise, its price often easily determined on current market trends, it ought not to have taken up a court's limited valuable resources to resolve the dispute.
- 26.3. Moreover, the parties could have resolved issues by resorting to the effective use of R41 A, which must be taken more seriously, particularly in such disputes between persons who, share relationships. In casu they are parents to their child.
- 26.4. Counsel for the respondent submitted a simple cost-effective method could have been to place names into a hat and one name pulled out, which could also have avoided this long delay, which the applicant complained has caused her much financial hardship.

POWERS OF THE LIQUIDATOR

27. As to the powers of the liquidator, our law is clear and provides for the various bodies with an oversight role to ensure that a party's interests are protected.
28. I have noted that each of parties in their orders set out the powers of the liquidator, which are similar.
- 28.1. The Liquidator shall have the following powers and functions:
- (a) To take control over the estate of the partnership between the parties and to assume all powers as administrator thereof.
 - (b) To accumulate details of all liabilities of the partnership.
 - (c) To sign and execute any document or deed in respect of the immovable property of the partnership thereby enabling transfer of the immovable property situated at [...] Breakfree Estate, Mimosa Road, Summerset, Midrand being Erf [...] Summerset: Extension 18.
 - (d) To realise the immovable property at the price that he/she deems fit to be the true market value of asset either by public auction or private treaty;

- (e) To engage the services of any suitably qualified person or persons to assist in determining the proper value or whereabouts of any assets of the partnership and to pay such person or persons the reasonable fees which may be charged by her/him;
- (f) To apply to this Court for any further directions as he/she shall or may consider necessary;
- (g) To institute legal proceedings against any person for the delivery to her/him of any assets, in the partnership in whatever Court it shall be appropriate to bring such proceedings;
- (h) To instruct and appoint attorneys and/or counsel to institute proceedings on his/her behalf for the purpose of obtaining delivery of any such assets alleged to be vested in the partnership and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the partnership in accordance with the principals set out in *Muller v The Master and Others*, 1992(4) SA 277 (T);
- (i) To pay the liabilities of the partnership;
- (j) To pay his/her reasonable fees and to apportion such fees between the parties in the same proportion as they are entitled to the assets of the partnership;

28.2. The division of the net assets shall be subject to the protection of the rights and claims of secured and preferent creditors of the partnership.

28.3. Any losses suffered by the partnership as a result of the wrongful behaviour of either of the parties or any previous liquidator in dissipating the assets (if applicable), shall be borne exclusively by such party and a distribution and division of the assets of the partnership or the proceeds thereof, as the case be, shall accordingly be subject to adjustment in accordance with his/her discretion.

28.4. The liquidator is entitled and authorised to compensate a party from the proceeds of the sale of the property for all expenses paid by such party in excess of their obligations to contribute 50% of all expenses to the partnership as a preferent claim against the proceeds thereof, as the case may be, which shall accordingly be subject to adjustment in accordance with his/her discretion.

I make the following Order:

1. The counterapplication in this matter is dismissed.
2. The Chairman of the Johannesburg Society of Advocates is to within thirty (30) days of this Order, appoint a liquidator to attend to the sale of the party's asset in their partnership.
3. That the partnership existing between the applicant and the respondent in respect of the fixed property situated at

"[...] Breakfree Estate, Mimosa Road, Somerset, Midrand being Erf [...] Somerset: Extension 18"

is hereby dissolved.

4. The cost of liquidation is to be paid by each party in equal shares.
5. Each party is to pay their own costs.

S MAHOMED

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or 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 7 February 2022.

Date of Hearing: 19 January 2022

Date of Judgment: 7 February 2022

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On behalf of

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