

SOUTH AFRICA / JUDGMENT

W.M.M v Jordaan N.O and Another (M447/2021) [2023] ZANWHC 119 (20 July 2023)

[2023] ZANWHC 119

COURT

North West High Court, Mafikeng

BEFORE

A H Petersen

CASE / FILE NUMBER

M447/2021

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Policy**IN THE HIGH COURT OF****SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NO: M447/2021**

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Magistrates: YES / NO

In the matter between: W[...]
 M[...] M[...]
 APPLICANT
 AND
 R
 P JORDAAN N.O.
 FIRST RESPONDENT
 D[...]
 L[...] M[...]
 SECOND RESPONDENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via e-mail. The date and time for hand-down is deemed to 15h30PM on 20 July 2023.
 ORDER
 The
 application is dismissed with costs.

JUDGMENT

PETERSEN J

Introduction

- [1] This application launched by the applicant on 27 July 2021 is opposed only by the second respondent. The first respondent whilst abiding by the decision of the Court has filed an explanatory affidavit for the assistance of the Court. The applicant seeks relief against the first respondent in the following terms (quoted verbatim):

“1. That the final report compiled by the First Respondent dated 28th April 2021, is reviewed and set aside.

2. That the First Respondent is directed to provide the Applicant and Third Respondent (sic Second Respondent) with the Final liquidation Report within 30 days of this court order.
3. Cost of this application.
4. Costs of this application.
5. Further and/or alternative relief.”

The parties

- [2] The applicant and second respondent were married in community of property which marriage was dissolved by order of Court dated 7 December 2015. The first respondent is cited in his official capacity as the Liquidator of the joint estate of the applicant and second respondent. The second respondent is cited in this application as a party with a direct interest in the matter.

Background

- [3] The applicant and second respondent were unable to reach consensus on the liquidation and division of the joint estate. The property which forms part of the joint estate in respect of which no consensus could be reached is described as follows in clause 5 of the settlement agreement which was incorporated as part of the divorce decree on 7 December 2015:

“5.1.2 the parties hereby agree that the following assets form part of the joint estate to be divided:

5.1.2.1 immovable property situated at:

5.1.2.1.1 No. [...] P[...] Street, Safari Gardens, Rustenburg;

5.1.2.1.2 3[...] L[...] Street, Unit 3, Thlabane Rustenburg

5.1.2.2 the following motor vehicles:

5.1.2.2.1 Mercedes Benz ML63 AMG with registration number H[...],

5.1.2.2.2 Mercedes Benz C220 AMG with registration number J[...],

5.1.2.2.3 Mercedes Benz E250 with registration number J[...],

5.1.2.2.4 Mercedes Benz C250 with registration number H[...],

5.1.2.2.5 Ford Ranger Double Cab with registration number J[...].

5.1.2.3 furniture, appliances and household goods contained in the two immovable properties (referred to) above.”

- [4] Two liquidators were appointed respectively, who for various reasons could not attend to their mandate before the appointment of the first respondent. On 6 July 2020, the first respondent was appointed by the Regional Magistrate, Rustenburg as liquidator or receiver of the joint estate of the applicant and second respondent. The first respondent, pursuant to his appointment and mandate compiled a Final Liquidation and Distribution Report dated 28 April 2021. The applicant upon receipt of the report instructed her attorneys to raise an objection to the report.

The grounds of review relied on by the applicant

- [5] The applicant contends that the first respondent in his final report disproportionately allocated certain share values of the joint estate to the second respondent. The applicant elaborates on this contention as follows. In respect of paragraph 3.1 of the final report which deals with fixed assets, the applicant contends that the total value of the immovable property at the time of the dissolution of the marriage was estimated at R5 850 000.00 and encumbered with a mortgage bond of R1 460 351.70, bringing the estimated net value of the immovable property to R4 389 648.30.

[6] The applicant and the parties major child occupied the Safarituine house prior to and subsequent to the dissolution of the marriage. To this end, the applicant contends that this property was considered a family home with the knowledge and approval of the second respondent. An institution account alluded to in the final report states the

applicant was for payments the second respondent would have paid in respect of the Safarituine house, irrespective of the fact that the applicant and their major child were in occupation of the property.

[7] The applicant as a result of the latter position contends that an amount of R438 272.00 alluded to in the report is inclusive of property rates which the second respondent was liable for, irrespective of whether or not he was in occupation of the Safarituine property or not. The applicant disavows any responsibility for this amount.

[8] The applicant further takes issue with the amount of R417 616.50 said to have been disbursed by the second respondent to maintain the Safarituine property and counters this by alleging that through her occupation of the house by cleaning and taking care of it that she has maintained the property.

[9] The applicant in respect of the fixed assets makes reference to the absence of the “municipal account owed” in respect of the property in Tlhabane.

[10] In respect of paragraph 3.2 of the final report which deals with the motor vehicles fixed assets, the applicant contends that the

estimated net value of the motor vehicles was R1 195 000.00 and the estimated liabilities R1 178 032.49 in 2015. The applicant goes on to estimate that an R16 967.51 stood to be shared between the parties in respect of the motor vehicles.

[11] In respect of the value of the furniture, the applicant takes issue with the figure of R46 510.00 provided by the second respondent, which she contends was thumb-sucked. In elaborating on this assertion, the applicant denies that she refused the first respondent and/or any appointed valuers access to the Safarituine property.

[12] The applicant concludes by contending that it is illogical of the first respondent to expect of her to pay the second respondent an amount of R389 235.35, on the basis of alleged irregularities in the conduct and report of the first respondent.

[13] The supplementary affidavit of the applicant does not advance the relief sought by the applicant in any material way.

The explanatory affidavit of the first respondent

- [14] The essentialia of the explanatory affidavit of the first respondent may be succinctly captured as follows. The first correspondence from the first respondent seeking an audience with the applicant was directed to her erstwhile attorneys on 13 July 2020. The applicant's erstwhile attorneys acknowledged receipt of the correspondence on even date with an indication that would provide the first respondent's office with her contact details, which was in fact supplied on 14 July 2020.
- [15] On 15 July 2020, the first respondent's office caused correspondence to be sent directly to the applicant to confirm on which of three dates she would be available to attend a consultation with the first respondent. The applicant's erstwhile attorneys were copied in this correspondence. An asset and liability statement was attached to the e-mail which the applicant was required to complete and return to the office of the first respondent. No response to this e-mail was forthcoming from the applicant.
- [16] On 31 August 2020, the first respondent's office caused further correspondence to be sent directly to the applicant, once again providing three alternative dates and times for the applicant to avail herself for a consultation. This correspondence was once again met with silence from the applicant. A follow up was done on 10 September 2020 by way of e-mail and still no response was forthcoming from the applicant.
- [17] On 7 October 2020 the applicant's erstwhile attorneys caused an e-mail to be sent to the first respondent's office enquiring if the applicant had scheduled an appointment with him. A response was sent on the same date, informing the erstwhile attorneys that no appointment had been scheduled as the applicant was either failing or refusing to co-operate. It was further pointed out that the second respondent has already attended his appointment on 17 September 2020.
- [18] In a further endeavour to secure an appointment with the applicant, the first respondent's office on 8 October 2020, caused a further e-mail to be sent to the applicant with three alternative dates in October 2020. Once again no response was forthcoming. On 19 October 2020, the first respondent's office sent correspondence to place the applicant on terms. It was brought to the applicant's attention, that if no co-operation was forthcoming on or before 28 October 2020, that the first respondent would proceed with his mandate. The applicant's erstwhile attorneys of record on the same date confirmed that the correspondence was forwarded to the applicant by way of WhatsApp and that the applicant gave them an undertaking that she would contact the first respondent's office to schedule an appointment.
- [19] By 20 October 2020, the applicant had still not scheduled an appointment, which was brought to the attention of the applicant's erstwhile attorneys of record who confirmed that another WhatsApp message had been forwarded to the applicant enquiring if she had contacted the office of the first respondent. A further request was directed that they be informed by 23 October 2020 if the applicant failed to make contact with the first respondent.

- [20] On 21 October 2020, the applicant's present attorneys of record advised the first respondent's office in writing that they were now representing the applicant. The first respondent was further informed that the applicant foresaw that she would only be available to attend an appointment with his office during February
2021. On 2 November 2020, the first respondent in writing informed the present attorneys of record, that he had a fiduciary obligation to comply with and proceed with his mandate so as not to prejudice any of the parties. The first respondent once again attached the Asset and Liability document to the e-mail for completion and return by the applicant, within 30 days. They were further informed that the first respondent would proceed with instructing valuers to proceed with valuations of all immovable and movable assets and that the applicant would assist in the arrangements to view the assets by the appointed valuers. In the event of the applicant reneging on the consultation in February 2021, the first respondent would proceed with his mandate as ordered by the court. The valuers were duly instructed on 2 November 2020.
- [21] On 16 November 2020, the second respondent's attorneys of record caused correspondence to be sent to the applicant's attorneys of record, raising their discontent with the applicant delaying the finalisation of the joint estate which she had been doing over several years. The first respondent was further requested to proceed with his mandate with or without the applicant's co-operation. On 17 November 2020 the first respondent's office replied, indicating that they would proceed with their mandate. On 18 November 2020, the applicant's attorneys of record replied to the correspondence from the second respondent's attorneys of record, denying that the applicant was delaying the finalisation of the division of the estate. They further indicated that the applicant had partially completed the statement of assets and liabilities which would be forwarded to the first respondent in due course. The said documentation has not been supplied to the first respondent to date.
- [22] On 4 December 2020, the second respondent's attorneys of record replied to the letter from the applicant's attorneys of 18 November 2020 once again requesting the first respondent to proceed with the finalisation of the joint estate. They further stated that should the applicant not co-operate that she should not complain at a later stage. On 08 December 2020, the first respondent replied to the letter of 04 December 2020 confirming that he was proceeding with his mandate and that he was awaiting the valuations from the appointed valuers, Valueprop.
- [23] On 21 January 2021, the first respondent addressed correspondence to the applicant's attorneys to enquire when the applicant would attend at his office for a consultation. Three dates were once again provided with reference to the correspondence of 2 November 2020. A reply was only received on 2 February 2021 in which the applicants attorneys alluded to the applicant having had talks with the second respondent and that in principle they were in agreement on how to deal with the division of the joint estate. To this end, the first respondent was informed that the applicant would not avail herself at his office on 3 February 2021 as previously arranged.

- [24] On 11 February 2021 the first respondent received confirmation from the valuers that they were unable to proceed with the valuations as the applicant had denied them access to the assets for purposes of conducting an evaluation. The first respondent as a result proceeded with his mandate and on 1 March 2021 distributed his provisional report to the parties.
- [25] On 2 March 2021 the first respondent received correspondence from the applicant's erstwhile attorneys enquiring about the legal costs which were not included in the provisional report, which the first respondent addressed in his final report. On 4 March 2021 correspondence was also received from the applicant's attorneys of record, stating that the applicant objects to the provisional report, as the immovable property was valued at R5 000 000.00 on 4 March 2021. The first respondent consequently amended the value of the immovable property to reflect the value as R5 000 000.00 in his final report.
- [26] On 28 April 2021 as indicated supra the first respondent distributed the final report to the parties, including the applicant's erstwhile attorneys of record. On 4 May 2021 the applicant's attorneys wrote to the first respondent stating that the applicant strongly objected to the final report and

requested that the liquidation process be stayed, as she would approach the second respondent to reach an amicable settlement which

would be less costly. The first respondent on 10 May 2021 indicated that he would revert to the applicant's attorneys. On 11 and 12 May 2021 the first respondent further received written submissions from the second respondent's attorneys in which they objected to the liquidation process being kept in abeyance and set out their reasons.

- [27] On 17 May 2021 the first respondent replied to the written submissions received from both parties. Subsequently, on 28 May 2021 the applicant's attorneys wrote to the first respondent indicating, inter alia, that the final report is incorrect as he had not consulted with the applicant; the information in the report was one-sided and therefore misleading and inaccurate; that the applicant did not refuse the valuers access at her sole discretion, but based on the second respondent also not wanting the valuations done; the arrear municipal account was incorrect as the meter is faulty and the Tlhabane property also had a substantial arrear municipal account; and that the applicant required a response before deciding on taking the matter on review or as a last resort that all assets be sold and the proceeds be divided between the parties. The first respondent replied on 1 June 2021 setting out a synopsis of the events leading to the provisional and final reports. The present application followed.

The duties of office of a liquidator/receiver

- [28] In *Gillingham v Gillingham* 1904 TS 609 Innes CJ stated as follows:

"The law governing this matter seems to be perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises,

who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the court to divide the estate, and the Court has 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 ... to collect, realise, and divide the estate. And that that has been the practice in South African Courts is clear."

[29] In *Nkanjeni v Paterson* (CA 282/2018) [2019] ZAECGHC 70 at paragraph [10], Goosen J described the effect of the appointment of a liquidator or receiver as follows:

"[10] The effect of the appointment of a liquidator or receiver is to place the assets of the joint estate under his/her authority, to divide the estate in accordance with the law, for and on behalf of the court. He/she is required to account for the liquidation and distribution by rendering a liquidation and distribution account, subject to objection by parties affected thereby. A receiver or liquidator is an officer of the court vested with authority to deal with the assets of the joint estate under direction

of the court. In *Coetzer v Coetzer* 1955 (1) PH B1 (O), in which the court dealt with the question of the locus standi of the parties to deal with the assets of their joint estate in the absence of the appointed receiver, the following was said about the office of receiver:

"Applikante het geen locus standi om die aansoek op eie houtjie te doen nie. Die ontvanger is 'n geregsamptenaar: hy verteenwoordig die hof. Assulks is hy 'n belanghebbende party in die aansoek en aplikante se aansoek gaan mank weens versuim om hom saam te voeg.

Vlg: *Gillingham v. Gillingham*, 1904 T.S. 609 at

612. *Johnson v, Johnson & Another*, 1935 K.P.A. 325 (25 P.H., B.24)

Dit is gebiedend dat hy saamgevoeg moet word as party wanneer die likwidasië of verdeling van die boedel op die spel is; in die

alternatiewe, as hy talm of versuim om sy pligte na te kom kan enige persoon wat belang het in die boedel aansoek doen by die hof vir 'n prestasiebevel; in die verdere alternatiewe kan hy weens wanadministrasie, wangedrag of pligsversuim wat die boedel benadeel op aansoek van enige belanghebbende deur die hof afgedank word. Maar vir enige belanghebbendes om onder mekaar te prosedeer oor die bates en op koste van die boedel sonder om die ontvanger saam te voeg, is iets vreemds in ons prosesreg. Geen bevel op die aansoek gemaak nie."

(Translated by Goosen J as follows: The Applicant has no locus standi to bring the application on her own. The receiver is an officer of the court: he represents the court. As such he is an interested party in the application and the applicant's application is defective for failure to join him.

Cf *Gillingham v Gillingham*, 1904 T.S. 609 at 612.

Johnson v, Johnson & Another, 1935 K.P.A. 325 (25 P.H., B.24)

It is obligatory that he be joined as a party when the liquidation and distribution of the estate is at issue; in the alternative, if he delays or fails to carry out his duties any person who has an interest in the estate can apply to court for an order compelling

performance; in the further alternative he can by reason of maladministration, misconduct or breach of duty be removed by the court on application by any interested party. But for any interested parties to proceed inter partes about the assets without joining the receiver, is unknown in our law of procedure.”

Discussion

- [30] In considering the evidence in this application holistically, the applicant essentially takes issue with the first respondent allegedly not consulting her as part of his mandate, that the second respondent allegedly acquiesced in proposing a settlement outside of the liquidation and distribution process and that the figures relied on by the first respondent are inaccurate.
- [31] In respect of the allegation that the first respondent failed to consult the applicant, the evidence demonstrates the following. The first respondent attempted on numerous occasions from 13 July 2020 to 19 October 2020 to schedule an appointment with the applicant which requests were met with deafening silence from the applicant. The applicant's erstwhile attorneys, during the aforesaid period, provided the applicant's contact details, including her e-mail address for purposes of the first respondent making contact with her. There is nothing in the evidence to suggest that the e-mail address of the applicant was incorrect and the applicant has not gainsaid this. By 19 October 2020, the applicant's erstwhile attorneys informed the first respondent that the applicant was informed of the content of their e-mail by WhatsApp and that she would contact him to schedule an appointment. The inaction on the part of the applicant, however, persisted. I hasten to add that the applicant at this stage had failed to complete and submit the list of assets and liabilities sent to her by the first respondent.
- [32] By 21 October 2020, the applicant had instructed her present attorneys. The applicant fortuitously up until the appointment of her present attorneys claims that she did not receive any correspondence from her erstwhile attorneys or the first respondent. The bona fides or mala fides of her erstwhile attorneys and the first respondent is brought squarely into focus by the applicant. In my view, nothing suggests that the first respondent acted mala fide during the period when the applicant was represented by her erstwhile attorneys by not communicating with her. Further, nothing suggests that the applicant's erstwhile attorneys did not communicate with her in respect of the first respondent's attempts at securing a consultation with her. Any blame for a delay in the finalisation of the process of dividing the joint estate of the parties, during the tenure of her erstwhile attorneys is solely attributable to the applicant.

- [33] From 4 November 2020 when the applicant instructed her present attorneys, the delay in finalising the process was perpetuated when the applicant gave no firm undertaking on a date for consultation with the first respondent. Instead it was said the applicant foresees being available only in February 2021. At this stage, the second respondent had already consulted with the first respondent, two months earlier. Notwithstanding objections being raised by the second respondent's attorneys on the delay at this stage, the first respondent remained amenable to consulting the applicant, albeit in February 2021. The first respondent went as far as providing the list and assets and liabilities to the applicant again for completion within 30 days. The applicant despite indications from her attorneys that the list was partially completed failed to submit same to the first respondent.
- [34] In February 2021, the applicant reneged on the appointment scheduled for 3 February 2021 on an allegation that the second respondent and herself had agreed to attend to the division of the joint estate outside of the first respondent's mandate. Once again, the first respondent cannot be blamed for not consulting the applicant. This brings me to the allegation that the second respondent acquiesced in a proposal to divide the joint estate outside of the first respondent's mandate as a less costly option.
- [35] The second respondent consulted with the first respondent in September 2020 and to this end made payment of an amount of R121 800.43 to the first respondent. The second respondent's attorneys on his instructions provided inputs on the provisional report and the final report. The second respondent denies having spoken to the applicant about the division of the joint estate. In the circumstances, it would be very peculiar of the second respondent to engage the applicant on the division of the joint estate outside of the first respondent's mandate.
- [36] This brings me to the issue of the inaccurate figures. The first respondent amended the valuation of the immovable property at Safarituine to R5 000 000.00 in his final report upon receipt of the valuation provided by the applicant. This valuation is to the benefit of both parties. In respect of the motor vehicles the applicant on her own account contends that not much equity remained to be divided in the joint estate. An issue is taken with the valuation of the furniture as being thumb-sucked. It is inescapable that the applicant had an opportunity when the provisional report was provided to the parties not only to object to the report but to provide inputs on the valuation of the furniture, which she failed to do. When the final report was submitted to the parties, a further opportunity was availed for further submissions with an indication that: "Should any party to this action wish to make further submissions, said submissions must be furnished to the Liquidator, Receiver and Divider in writing, accompanied by documentary evidence within 14 (fourteen) days from date hereof." The applicant once again did not avail herself of the opportunity to submit documentary evidence, of what is now alleged to be inaccurate figures which are thumb-sucked.

[37] The applicant in the final analysis is the proverbial author of her own misfortune, which she seeks to remedy through the present application in an attempt at getting a second bite at the cherry.

[38] The application accordingly stands to be dismissed.

Costs

[39] Costs follow the result. I can find no basis to order otherwise.

Order

[40] The following order is accordingly made:

A H PETERSEN

JUDGE OF THE HIGH COURT

OF SOUTH AFRICA

APPEARANCES

COUNSEL FOR APPLICANT: ADV G K SELEKA Instructed by: Guy Gumbo Attorneys c/o Mokhetle Inc 18 Havenga Street Golfview MAHIKENG COUNSEL FOR SECOND RESPONDENT: ADV T MASIKE Instructed by: NIENABER & WISSING ATTORNEYS Office 1, First Floor 4204 Palmer Crescent Leopard Park MAHIKENG

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12 MAY 2023

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20 JULY 2023

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