



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Case No: 1817/2022

In the matter between:

WILMA JOHANNA SMITH

Applicant

And

TOBIAS JOHANNES ALBERTS

First Respondent

MARIA ALBERTS

Second Respondent

JUDGMENT

BESHE J:

[1] The applicant in this matter seeks a declarator that she is a part-owner with first respondent of Erf [...], Cradock, a property held by Deed of Transfer No. T61800/1991/CTN situated at [...] [...] Street, Cradock, Eastern Cape. As an ancillary order, applicant seeks an order for the appointment of Receiver and Liquidator for purposes of realising the property in question.

[2] Applicant and first respondent were married to each other in community of property during the year 1983. The marriage was dissolved by an order of this court in March 1995. According to the applicant, when finalising the divorce, they did not expressly deal with the immovable properties that constituted their joint estate. However, all the movable property was divided

between them in terms of a Settlement Agreement entered into with the first respondent. Their immovable property consisted of their marital home situated at [...] [...] Street, Cradock. It is common cause that this property has since been sold. The property that is the subject matter of this application also formed part of the parties' joint estate. First respondent operated a metal reclamation business from the said property. It is still registered in the names of the applicant and that of the first respondent. According to the applicant, there is no meaningful communication between her and the first respondent, as a result of which they neglected to divide or deal with their immovable properties. She also points out that in terms of the Decree of Divorce the first respondent remained liable to settle the outstanding bond in respect of the said property which he did in due course.

[3] It is also common cause that first respondent subsequently married the second respondent, which marriage was dissolved in October 2016. Thereafter, the property situated at [...] [...] Street was sold and proceeds thereof divided between the applicant and second respondent. No relief is sought from the second respondent in respect of this property. The registration of transfer of the Sprigs Street property took place in February 2022.

[4] It was upon receipt of a Deed of Sale in respect of the Sprigs Street property that her memory about the existence of the two properties was revived, spurring her into action in respect of this application. Hence the orders that she seeks.

[5] The application is only opposed by the first respondent. Henceforth he will be referred to as the respondent. He denies that at the time of their divorce the parties did not discuss matters relating to their immovable properties. He contends that the parties agreed that the applicant who wished to leave the premises (presumably the property in question) would do so without any encumbrances. Further that it was agreed between the parties

that he would shoulder the responsibility of paying all the debts of marriage including, *inter alia*, the balance still owing on applicant's motor vehicle; any bonds over their properties. This, he asserts, was to enable the applicant to relocate debt free. He also paid the costs of the divorce action. Importantly, at paragraph 6 (vii) of his answering affidavit, he states that "*I respectfully submit that should we have agreed that any immovable property be transferred and registered in her name, this would most emphatically have been included in any Order of Divorce*".

[6] Respondent, though admitting that the property in question is still registered in the joint names of the parties, he denies that the applicant is entitled to an undivided 50% share of the property. He further asserts that it is unthinkable that the applicant forgot about the properties for a period in excess of 20 years as she alleges.

[7] It is noteworthy that respondent does not offer much explanation about what the agreement was regarding the Sprigs Street property and why only in 2022 registration of transfer thereof took place. In excess of 20 years after their divorce. It is common cause that part of proceeds from the sale of this property were paid to the applicant. He offers no explanation why if they had agreed as he suggests, part of the proceeds of the sale of this property was paid to the applicant.

[8] Applicant attributes the failure to transfer applicant's share of the property / properties into his name to his attorney who has since died. No details are provided as to when the attorney died.

[9] Noteworthy also is the fact that no order was made in terms of the Settlement Agreement between the parties regarding their immovable properties. Applicant denies there was ever an agreement regarding their immovable properties.

[10] Applicant also makes the point that in terms of *Section 2* of the *Alienation of Land Act*, no alienation of land will be of force and effect unless it is contained in a Deed of Alienation signed by the parties thereto.

[11] The parties are at variance as to whether or not there was an agreement about the fate of their immovable properties. So, clearly there is a dispute of fact in this regard.

[12] It is trite that where in motion proceedings disputes of fact appear from the affidavits, a final order may be granted if the facts averred by the applicant and have been admitted by the respondent, together with the facts alleged by the respondent justify the granting of such an order.¹ Trite also is that there may be instances where the denial by the respondent of a fact alleged by the applicant may not be such that it amounts to real *bona fide* or genuine dispute of fact.² In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another***³ a real, genuine and *bona fide* dispute of fact was held to exist “*only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed*”. Likewise, in ***National Director of Public Prosecutions v Zuma***⁴ the court once again had to comment on ***Plascon-Evans*** rule. In the process, the court had this to say:

“It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers.”

[13] The version proffered by the respondent seems to me, to fall squarely into a dispute of fact that is not real or genuine or *bona fides*, one that is fictitious and palpably implausible. It also lacks detail as to when and under what circumstances the purported agreement was reached regarding the

¹ See *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634 H-J.

² *Plascon-Evans supra* at 634 I.

³ 2008 (3) SA 371 SCA at 375 [13].

⁴ 2009 (2) SA 277 SCA at 290.

immovable property. Why did it not form part of the Deed of Settlement that was incorporated into the Decree of Divorce? Why for over 20 years no attempt was made to transfer applicant's share of the property to him? Why despite the said agreement, when the Sprigs Street property was sold in respect of which registration of transfer took place during 2022, applicant received a share of the proceeds of its sale?

[14] Respondent seems to suggest that the reason applicant agreed that the properties would devolve upon him alone was that he was going to take the responsibility for paying all amounts due in respect thereof. But the question stands, why pay to the applicant a share of the proceeds in respect of the Sprigs Street property?

[15] It is also by operation of law that if parties are married in community of property as the parties in this matter were, they share a joint estate. Their immovable properties belong to the joint estate, regardless of each parties' contribution towards the asset.

[16] Even though first respondent does not contend that this purported agreement formed part of their Deed of Settlement, there was a suggestion in argument that paragraph 6 (c) of the Deed of Settlement gave effect thereto. In particular *Clause 6 (c)* thereof. It will be apposite to reproduce the whole of *Clause 6*:

"6. Ter vordiring van die gemeenskaplike boedel, kom die partye Hiermee as volg ooreen:

- (a) Verweerder sal aanspreeklik wees vir betaling van alle skulde van die gesamentlike boedel soos en met datum van ondertekening hiervan en veral die lening verskuldig aan Boland Bank in naam van die Eiseres behalwe die petrolrekening;
- (b) (i) Verwoerder sal aan Eisores die partye se Phillips hoortroustal, die swart en wit TV stele n die yskas wat tans by Verweerder se skroothandelbesigheid gehou word, asook die klavier wal Eiseres geërf het, lewer.

(ii) Die Werweerder onderneem om te betaal vir die Vervoer van bogemelde artikels op voorwaarde dat Eiseres self reëlings vir die Vervoer daarvan met SpoorNet.

(c) Behalwe soos uiteengesit in paragraaf 6 (b) hierbo, sal elke party daardie gedeelte van die gemeenskaplike boedel tans in sy of haar besit, behou as sy of haar ultsluitlike eiendom.”

It was suggested in argument that *Clause 6 (c)* dealt with the immovable property.

[17] If each party was to retain property in their possession including the immovable properties, it means the parties agreed that first respondent would retain both immovable properties. This is so because according to the applicant at the time of the divorce she “relocated”. She moved from Cradock and respondent occupied both properties. Ran his business from one and resided in the other. The question however still remains: If the parties included items such as a black and white TV set in their Deed of Settlement, why would they not include and fully describe the immovable properties and their agreement in relation thereto?

[18] For all the reasons stated hereinabove, I am satisfied that the applicant has made out a case for the relief she seeks. And that respondent’s denial that they did not deal with the immovable properties at the time of the divorce falls to be rejected.

[19] I have slightly tweaked the order sought by the applicant especially as regards the powers and rights of the liquidator. Some of which were considered to be unnecessary for purposes of this case. I am also of the view that the Receiver’s remuneration should be paid from the proceeds of the realisation of the property and not from first respondent’s share of the joint estate. No case has been made for an order that it should be paid from respondent’s share of the joint estate.

[20] Accordingly, the following order will issue:

It is hereby declared that -

1. The immovable property described as:

1.1 Erf [...] Cradock, held by Deed of Transfer T61800/1991/CTN situated at [...] [...] Street, Cradock, Eastern Cape Province is owned in equal shares by the Applicant and the First Respondent and constitutes the only asset remaining in their joint estate.

2. That Tertuis van der Walt, an accountant of Gerber, Botha and Gowar Inc, Cradock is hereby appointed as the Receiver and Liquidator in the Joint Estate of the Applicant and the First Respondent to realise the joint estate's assets for the purpose of dividing the Joint Estate described in paragraph 1 hereof.

3. That the said Tertuis van der Walt, in his capacity as Receiver and Liquidator be employed to act as follows:

3.1 To take possession of the asset belonging to the Applicant and the First Respondent and settle any claims which creditors may have against the joint estate in respect thereof;

3.2 To prepare a final account between Applicant and First Respondent, and to divide the joint estate after payment of its liabilities in accordance with the account.

4. The liquidator shall have the following powers:

4.1 The right to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets comprising the joint estate;

4.2 The right to obtain information regarding their financial affairs from bank managers, building societies, managers or any other financial institutions where moneys may have been invested;

4.3 The right to make physical inspection of the asset and take inventories;

4.4 The right to question the parties and obtain all explanations deemed necessary by them for the purpose of making the division;

4.5 The right to realise the asset on such items as the liquidator may deem fit, including by public auction, private treaty or otherwise;

4.6 To sign and execute any documentation necessary to effect transfer or realisation of the asset of the joint estate;

4.7 The right to obtain appraisals and valuations for the purposes of determining the value of the Joint Estate.

5. the liquidator shall not be required to lodge security for his administration of the Joint Estate.

6. The liquidator shall be relieved of his duties as follows:

6.1 Upon completion of his account, the liquidator will forward a copy of such account to the parties' respective attorneys.

6.2 The liquidator will also send his account by prepaid registered mail or hand delivery to the addresses of the Applicant and First Respondent as reflected above.

6.3 Both Applicant and First Respondent shall be entitled to raise objections to the said account within 14 days from date that such account had been sent. Should the liquidator not receive any

objection from either Applicant or First Respondent within the 14 day period, the said account shall be deemed to have been confirmed by Applicant and First Respondent and the liquidator shall proceed to finalise the estate in accordance with the said account.

7. The remuneration to which the Receiver is entitled is to be paid out of the proceeds of realisation of the property.

8. First respondent is to pay the costs of this application.

**N G BESHE
JUDGE OF THE HIGH COURT**

APPEARANCES

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Date Heard : 16 February 2023

Date Reserved : 16 February 2023

Date Delivered : 30 May 2023