REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
09/10/2023	_____
DATE	SIGNATURE

Case Number: 2014/9152

In the matter between:

DAVID KGAILE MOGATUSI Applicant

And

STANLEY LACEY First Respondent

JUDGMENT

YACOOB J:

1. The applicant and the third respondent were previously married. They were divorced in February 2017. The first respondent was nominated as a referee by the second respondent in terms of the settlement agreement that was incorporated in the decree of divorce.

2. The applicant was unhappy with the way in which the first respondent carried out his duties and instituted this application for his removal in November 2018. The matter has since been in court three times, and there are already two judgments dealing with the first respondent's unsatisfactory fulfilment of his functions, but the matter is still not finally determined, as each of the earlier judgments found it necessary to direct the first respondent to do certain things and file further affidavits before a final decision could be made.

3. The first respondent contends that he has completed his mandate and that the application is moot. The applicant maintains that he has made out a case for the first respondent's removal, and that the only reason the first respondent has not been removed is that he was given opportunities to redeem himself by previous courts.

4. I am of the view that the first respondent's mandate has in fact been completed, and that the applicant has other remedies to deal with any dissatisfaction that results from the outcome of the process. There is nothing to be gained from removing the first respondent and causing a new referee to determine and distribute the difference in accrual which resulted from the existence of the marriage.

5. However, this does not mean that the application stands to be simply dismissed. The first respondent cannot rely on the effluxion of time to avoid any responsibility, and at the very least the applicant may be entitled to a costs order in his favour. The court is therefore entitled and required to examine the issues

with a view to determining this. It is also necessary to consider the history of this matter in the courts to come to a proper conclusion.

The settlement agreement

6. The applicant and third respondent were married out of community of property, but with accrual. The commencement value of both estates was recorded as R0.

7. In terms of clause 14 of the settlement agreement, the accrual would be determined by a person nominated by the second respondent, who would be appointed as the liquidator to do what was necessary to effect an equitable division.

8. Unfortunately the agreement was cast in terms which referred to a “joint estate” rather than determination of accrual and distribution of assets in accordance with the accrual.

9. The powers of the liquidator and receiver as set out in the agreement included that they would realise the joint estate, receive, liquidate and distribute the assets, make necessary investigations regarding the assets, and ancillary powers. All these powers referred to “the joint estate”, rather than the accrual. This appears to have been a drafting oversight.

10. The agreement also dealt in clause 12 with the disposal of the immovable property owned jointly by the parties. It provided that the nett profit would be held by the conveyancing attorneys pending final determination of the accrual, and

that the applicant's share would be used to pay taxed costs and wasted costs orders which he owed to the third respondent.

The applicant's complaints

11. In his founding affidavit the applicant complained of the following conduct by the first respondent.

11.1. He authorised advance payments to the third respondent, of R10 000 and R385 268.78 from the proceeds of the sale of the immoveable property (in addition to the taxed costs due to her), but declined to authorise advance payments to the applicant of more than a total of R80 000.

11.2. He suggested that the advance payment to the third respondent was in terms of the settlement agreement, specifically for maintenance, which the settlement agreement does not provide for.

11.3. He included the applicant's pension fund in the accrual calculation but not that of the third respondent.

11.4. He included investments of the third respondent's in the calculation but did not investigate a line item referring to "withdrawal fees" which occurred after the divorce was instituted but before it was finalised.

11.5. He delayed the process by alleging that Momentum was not providing figures of the applicant's pension fund, but accepted the third respondent's own information about her investments.

11.6. In his first calculation, the sale of the immoveable property is excluded, and the commencement values of the third respondent's investments were subtracted, while the applicant's commencement value of his pension fund was not subtracted.

11.7. His second calculation does the same.

11.8. He attempted to get the applicant to amend the settlement agreement to allow the transfer of half of his pension interest to the third respondent, when the difference in accrual had not been finalised, and according to the initial calculations was in any even less than the amount of half of the pension interest.

11.9. That the first respondent appointed attorneys to assist him to carry out his functions, and at the expense of the applicant.

11.10. He prepared the initial calculations without having had sight of the antenuptial contract.

12. In sum, the applicant contends that the first respondent is biased and incompetent. He seeks, in addition to the removal and replacement of the first respondent, an order that the person replacing him investigate whether the first respondent breached his fiduciary duties. He also seeks the stay of the first respondent's fees until the Court determines whether the first respondent breached his fiduciary duties, and, once that is done, that the Court determine whether the first respondent is entitled to any fees, and whether he should pay any money to anyone.

The first respondent's defence

13. In his answering affidavit, the first respondent denies that he has breached his fiduciary duty in any way, and contends that the whole application is simply because the applicant is unhappy that the first respondent did not accede to his requests for advance payments, and that he has to pay money to the third

respondent because his accrual is greater. He maintains that he was not obliged to make advance payments to the applicant. He does not explain why he was either obliged or in a position to make advance payments to the respondent.

14. The first respondent contends that the applicant was obstructive. He maintains that everything he did was “documented and accounted for”. He does not explain why he prepared initial calculations without having had sight of the antenuptial contract, on what basis he assumed he could prepare the calculations, or why he should be able to charge fees for those calculations.

15. He contends that the R10 000 paid to the third respondent was for a bond payment that should have been paid by the applicant, and that the R385 268.78 was paid “in accordance with the settlement agreement”. He does not say which clause of the settlement agreement. He states that the payment was only made after it was apparent that the applicant’s accrual would exceed the third respondent’s. He states that he did not pay the applicant further sums because the applicant was rude and dishonest. He does not disclose the reason for the third respondent’s request for payment and on what basis he determined that it was proper.

16. He denies that he had to investigate the third respondent’s assets at all.

17. The first respondent was appointed in July 2017. The application was instituted on 20 November 2018, by which time no preliminary account had been produced. The first respondent avers that he had prepared the preliminary account by

December 2018 and annexes it to his answering affidavit, dated 24 January 2019. It is not clear why it took so long, nor whether it was provided to the parties in advance of being annexed to the affidavit.

18. On 4 June 2019 a supplementary affidavit was delivered containing the so-called finalised account, and contending that the application was therefore moot.

19. The first respondent has had three further bites at the cherry, two having been given to him by the courts in an effort to allow him to properly explain his conduct, and one taken by him in an attempt to show that the application is moot.

The passage through the courts

20. The application was first set down for hearing in the opposed motion court in November 2019. In a written judgment, Dippenaar J found, amongst others that there was merit in the contention that the final account was only prepared so that he could argue the application was moot and to avoid scrutiny of his conduct, and that the first respondent had not properly explained his conduct. Finding that there were insufficient facts to determine the question, she directed the first respondent to provide a comprehensive accounting report, and that the applicant and third respondent be permitted to challenge the report. She also permitted that the papers be supplemented and reserved costs.

21. In August 2022, the applicant attempted to amend the relief sought, to simply ask the first respondent to file an interim liquidation and distribution account, a report of what had been done, and certain information regarding the third respondent's

finances. The amended notice of motion was filed shortly before the matter was set down on the opposed roll, and resulted in a postponement. The applicant was ordered to file an affidavit setting out why he should not have to pay costs, and in that affidavit withdrew the purported amendment and tendered costs of the postponement. His reason was that he had received poor legal advice. I do not venture an assessment of the attempt to amend.

22. The third time the matter was set down on the opposed motion roll was in May 2023. Fisher J in her judgment noted that the first respondent continued to assert that he has no obligation to investigate or account in relation to the third respondent's pension fund assets. In fact, contrary to the finding of Dippenaar J, he continued and still continues to assert no obligation to investigate at all. The first respondent requested yet another opportunity to deal with the matter properly. He was indulged because of the seriousness of a failure to comply with a court order. He was ordered to pay the costs because of his approach to the matter. He was ordered to file an affidavit dealing in particular with the third respondent's pension fund assets.

Assessment of the third respondent's further explanations

23. None of the first respondent's three supplementary affidavits show that he has taken heed of the judgments of this court. He continues to assert that he had no duty to investigate, and that he did not have to explain the basis on which he paid the third respondent such a hefty advance. He appears to resent being called upon to account, either to the court or to the parties, for his conduct. He does finally show some explanation of the manner in which he assessed the third

respondent's assets, but still maintains, somehow, that there is no obligation on him. It still remains a mystery why he felt it necessary to scrutinise the applicant's requests for advances and not those of the third respondent.

24. The fact that the respondent continues to merely assert his position, without providing a proper basis for that assertion, and that much of his conduct still remains a mystery leads to the unavoidable conclusion that there is no proper basis for that conduct. He is therefore, at the very least, liable for the costs of this matter.

25. The respondent's entitlement to fees is also still to be determined, as that question was stayed by Dippenaar J. It is clear that the respondent was not sufficiently diligent in fulfilling his duties, and that he did certain things either without properly considering the issues, or even for his own interest. In particular, the first interim calculation which was, with no explanation, prepared before he had seen the antenuptial contract. Similarly, the attempt to get the applicant to sign an amendment to the settlement agreement, has absolutely no justification in the context of this matter. Finally, the so-called final account was clearly prepared in his own interest so that he could avoid the consequences of this application. It has already been found not to be a proper account. I do not consider that the first respondent should be entitled to fees for those activities.

26. As I have mentioned above, there is nothing to be gained by removing the first respondent, as he has now, finally completed his mandate, and if the applicant is unhappy with the outcome he has other remedies available to him.

27. I therefore make the following order:

1. The first respondent has not satisfactorily carried out his fiduciary duties in this matter.
2. The first respondent's fees and disbursements associated with the preparation of his first interim account, the attempt to amend the settlement agreement between the applicant and the third respondent, and the final account attached to the supplementary answering affidavit of 23 May 2019 are disallowed.
3. The first respondent is to pay the costs of this application.

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S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant: A Khoza
Instructed by: Mafenya Attorneys

Counsel for the First Respondent: Y Alli
Instructed by: Moss Marsh Georgiev Inc.

Date of hearing: 22 August 2023
Date of judgment: 09 October 2023