IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE NO: 51743/16

DATE OF JUDGMENT: 25/1/2018

In the application of:

E. M **APPLICANT**

and

W.S.M **RESPONDENT**

JUDGEMENT

NAIR AJ:

[1] This is an application for the appointment of a liquidator/receiver in respect of the erstwhile joint estate of the parties. The applicant and the respondent were married to each other in community of property on the 2r3d November 1988 and divorced on 22nd October 2012.

[2] The applicant approaches the Court on the basis that the joint estate has not been divided in a complete and proper manner as per the settlement agreement which was incorporated into the decree of divorce.

[3] The respondent raised three preliminary issues at the commencement of

the hearing. These are that the applicant's claim has prescribed; that the nature of the relief sought will nullify the agreement which was already made an order of Court; and further that the applicant ought to apply for rescission or variation of the final divorce order.

[4] The respondent seeks relief in the counterclaim for an order that the applicant be directed to sign all documents necessary to effect transfer of the applicant's undivided half share in the immovable property into the name of the respondent.

[5] The background facts are the following: In terms of the settlement agreement the joint estate was divided on the following basis:

a. With regard of the movable property it was agreed that the applicant would receive the movable property except for the Hyundai Sonata vehicle.
b. The parties will be entitled to 50% of each other's policies and investments etcetera as on the date of signature of these documents, should same exist. It is specifically recorded that should it come to light that either party did not disclose ownership of any policy, investment portfolio, et cetera, before the date of division, the other party may claim 50% of the monetary value of the policy.
c. The parties will be entitled to 50% of the benefits of each other's pensions on date of signature of this document, should same exist. It is specifically recorded that should it come to light that either party did not disclose ownership of any pension , provident fund, et cetera, before the date of division, the other party may claim 50% of the monetary value of such pensions, provident fund, et cetera.
d. The parties agree that plaintiff and defendant are both owners of the immovable property, situated [….], the value of which is unknown to the parties, but encumbered with a bond of plus/minus R 2,000 000.
e. The communal immovable property will be evaluated by an independent valuator, appointed by Investec bank, such valuation fees will be paid by both the parties equally.
f. The property shall after valuation be placed on the open market and

sold for the highest offer and both parties will agree to full co-operation of the same effect. Should any of the parties not give cooperation the applicable sheriff will have the right to sign in such parties behalf.

g. After sale of the immovable property, the profits, if any after the settling of the bond and the communal debts relating to the communal home, will be divided equally between the parties.

h. This agreement constitutes the whole agreement between the parties and no variation or amendment hereof shall be valid and binding unless reduced to in writing and signed by both parties.

[6] Following the divorce, the applicant received a cash amount in lieu of the Sonata vehicle and on the 16th November 2012 she received a further amount of R 1 350 000, 00 which amount is the focus of the dispute between the parties.

[7] The respondent maintains that this amount was paid as the applicant's half share of the immovable property whilst the applicant maintains that she believed this sum was her contribution of half share of the joint estate excluding the matrimonial home.

[8] The applicant believes that the joint estate has not been divided whereas the respondent believes that the joint estate was dissolved by the decree of divorce. The respondent argues that the parties had agreed on the modus of the division of the estate and what must follow is the enforcement of the agreement.

[9] He contends that it is not unusual for parties to amend their settlement agreements. He argues further that parties may either agree to a settlement agreement which deals with such division or appoint a receiver and liquidator. Once that decision is taken the matter is res iudicata and accordingly there is no basis for the applicant to approach the Court for the relief as set out in the notice of motion.

[10] The preliminary issue relating to prescription can be dealt with short shrift. In Prime Fund Managers (Pty) Ltd v Rowan Angel (Pty) Ltd and Another 2014 (2) All SA 227 Murphy J held:

> "Once an award is made an order of court in will become a judgement debt in respect of which the period of prescription will be 30 years".

[11] I agree with the Advocate Willemse (counsel for the applicant) that the settlement agreement constitutes a judgement debt as envisaged in section 1 (1) (a) (ii) of the Prescription Act 68 of 1969.

[12] It is clear that the settlement agreement deals with the division of the joint estate at length. It follows that for that reason there was no appointment of a receiver or liquidator. The question is what must happen where parties do not comply with the terms of the settlement agreement. In Maharaj v Maharaj and Others 2002(2) SA 648 (D & CLD) at 652 C, Magid J stated

> "The parties are entitled of course to agree on the manner of division. If they cannot agree a liquidator may have to be appointed."

[13] The matter is adequately summarised in Gillingham v Gillingham 1904 TS 609 Innes CJ states:

> "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."

[14] The first occasion that the applicant had reason to believe that the funds that she had received were in respect of the property was when she received a letter from the applicant's attorneys four years later requesting her to facilitate the transfer of the property to the respondent's name.

[15] In the letter dated 10th March 2016 the respondent's attorneys Mkhavele

Incorporated dispatched a letter to the respondent which reads as follows:

> 'The above matter refers; we confirm that we act on behalf of our client, Mr William Simon Makwinja. It is our instruction that in terms of the final order of divorce dated 25th October 2012 and the settlement agreement thereto, claus-e 8.4 took effect and our client has bought your client out of the property. An offer of settlement was made to Esnat Makwinja on the 9t h of November 2012 in the amount of one million three hundred and fifty thousand rand together with the house in Chigumula, Malawi and same was accepted by your client an amount of one million three hundred and fifty thousand rand was transferred, paid into your clients account on the 15t h November 2012. We are informed by transferring attorneys, Lambright attorneys that they have contacted your client through you in order for her to sign the transferring documents but your client has not honoured same. We therefore request that you inform your client to cooperate and sign the transferring documents on or before 18th March 2016 failure which we will have no option but to approach the High court to compel her to sign or the sheriff of the high court sign on her place and she will be responsible for any wasted legal costs occasioned by such action. Kindly note that should she fails to sign the transferring documents within the stipulated time frame herein, this letter will also be used in support of our High Court application and we will also seek for a punitive cost order against her. We hope you will treat this letter. with the urgency it deserves. We wait to hear from you as a matter of extreme urgency.''

[16] The applicant acknowledges receipt of the R1 350 000 with regard to the immovable property and concedes that she did not sign over the transfer of the property share to the respondent.

[17] The applicant denies having accepted any offer on 9 November 2012 by email and denies that she disposed of her half-share in the common property. She maintains that the joint estate has not yet been divided in a complete and proper manner.

[18] She states that she received the amount under the bona fide mistaken

belief that it was her share of the joint estate. She believes that the respondent misled her and the court with regard to his assets at the time of the settlement agreement.

[19] The applicant also avers that she was not satisfied with the contents of the settlement agreement but agreed to same because she acted under duress. Equally she was not satisfied with the service rendered to her by the Legal Aid Board.

[20] She states that shortly after the granting of the divorce, the respondent spent almost four million rand on inter alia a new motor vehicle and business, she has argued that there is no way that such amount could have been generated in such a short period after the divorce. There is nothing to substantiate these assertions at all.

[21] The issue is whether the erstwhile joint estate has been divided in terms of the settlement agreement. It is clear from the email correspondence exchanged between the applicant and the respondent that the applicant accepted the R1350 000,000 as payment for her share of the property.

[22] The respondent had communicated with the applicant with regard to the purchase of her half share of the property. In so doing the respondent did not have regard to the clause in the agreement and sought to buy out the applicant in a manner that he saw appropriate. He was not entitled to do ·so, because the agreement contained non-variation clause- "This agreement constitutes the whole agreement between the parties and no variation or amendment hereof. Shall be valid and binding unless reduced to writing and signed by both parties." The difficulty that the respondent is faced with is that there was noncompliance with the terms of the settlement agreement.

[23] The applicant states that the terms of the contract provide for the manner in which the joint estate was to be divided and did not include the appointment of a receiver and liquidator when it clearly did make provision for same in clause 8.2. It is because the agreement provided for the manner in which the joint estate was to be divided that no liquidator/receiver was appointed.

[24] The respondent argues that the applicant ought to have dealt with the issue of the proceeds of policies and investments at the date of the divorce. Notwithstanding his assumption .that her claim has prescribed he tenders to provide the respondent with a consent form to obtain all information regarding his policy and investment portfolios at the date of the divorce.

[25] The respondent further argues that the applicant must lay a factual basis for the allegation that he had interests and/ or shares in various companies and entities that were not disclosed to the applicant prior to the signing of the settlement agreement. He misdirects himself in stating that the joint estate was properly divided as per the agreement. He simply did not allude by the terms of the settlement agreement more specifically paragraph 8 thereof.

[26] The high water mark of the respondent's case is that the joint estate was terminated with granting of a decree of divorce incorporating the settlement agreement dealing with the division of the joint estate. He maintains that there is no longer a joint estate and a receiver and liquidator cannot be appointed in light of the prevailing court order.

[27] He also admits that if the applicant is of the view that she is entitled to any further assets in terms of the prevailing court order she should approach the court for an order that he should comply with the court order and not for an order wherein she attempts to nullify the present court order and settlement without any foundation. The question that remains unanswered is where did he get the money for the house to buy her out?

[28] There does not appear to be any problem with the movables at all. She did not receive any proceeds from policies and investments. She believes that the respondent has interest and/ or shares in various companies and entities which were not disclosed to her prior to the signing of the agreement. These should be considered as assets of the joint estate with regard to which she did not receive any proceeds.

[29] The respondent argues that the applicants claim for the division of the joint estate has prescribed and appointing a liquidator will nullify the agreement pertaining to the patrimonial consequences of the marriage which agreement was

made an order of court. The respondent also contends that there can be no appointment of a liquidator/receiver unless provision is made in the settlement agreement for the division of the estate..It is further argued that the applicant should apply to cancel the agreement because the relief sought will vary the court order granted on 26/10/12. The respondent further argues that the applicant should apply for rescission or variation of the court order. The respondent argues that the court order did not include a specific term that the joint estate be divided but rather provided that the settlement agreement be made an order of court.

[30] The question arises on what grounds the respondent should seek to rescind the order. The grounds for the rescission of such an order are governed by Rule 42(1) and the common law. In terms of Rule 42, the Court may rescind a judgement on one or more of the following grounds:

> "An order or judgement erroneously sought or granted in the absence of a party affected thereby. An order or judgement in terms whereof there is ambiguity or a patent error or omission but only to the extent of such ambiguity, error or omission and an order or judgement granted as a result of a mistake common to the parties."

[31] The provisions of Rule 32 (2) (b) of the Uniform Rules state that an applicant must provide a reasonable explanation for his/her default and must be bona fide in the making of such application. The applicant must show that he has a bona fide defence to the plaintiff's claim. It is sufficient if he/she makes out a prima facie defence setting out averments, which if established at trial, would entitle him/her to the relief asked for. The requirements are essentially the requirements in terms of the common law.

[32] The respondent agrees that the settlement deals with the manner in which the joint estate was to be divided. The question remains was it indeed divided in the manner that the agreement specifies. The respondent argues that because the settlement agreement deals with the manner in which the joint estate was to be divided, there is no longer a joint estate.

[33] The respondent contends that the settlement agreement is a valid contract, binding on both parties and states that "we" performed in terms of the

contract. The question is did he perform in terms of the contract.

[34] It is clear that the respondent agrees that the settlement agreement made provision for the division of the estate and with regard to the immovable property the specific manner in which that had to be done. There was noncompliance with the manner or modus in which this was to be attained.

The respondent took it upon himself to offer the applicant a sum for the property and this is indeed a variation of the settlement agreement. In the circumstances it is appropriate that a receiver and liquidator be appointed to give effect to the settlement agreement particularly in regard to the immovable property.

[35] In the circumstances I am of the view that this Court should intervene and grant the applicant the relief sought.

ORDER

1. The counterclaim is dismissed with costs
2. Adv Vernon Strauss is hereby appointed as receiver and liquidator in the erstwhile common estate of the applicant and respondent. He is bestowed with the powers and authorities as set out in Annexure XYZ01 annexed to the Notice of Motion.
3. Applicant is awarded costs of the application

NAIR AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing:

Date of Judgment:

Attorneys for the applicants :Carien Lauw Incorporated

Counsel for the applicants : Advocate J Willemse

Attorney for the respondent :C J Mkavele

Counsel for respondent : Advocate Van Niekerk