

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 8597/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 25 May 2022 E van
der Schyff

In the matter between:

C[...] M[...]

APPLICANT

and

R P JORDAAN t/a DIVORCE
SETTLEMENT AGREEMENTS

FIRST RESPONDENT

N[...] M[...]

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

[1] In this application the applicant, Mrs. M[...], seeks to have the report of the first respondent (RPJ) reviewed and set aside, based on the applicant's claim for an

adjustment in terms of section 15(9) of the Matrimonial Property Act, 88 of 1984 (the MPA).

[2] The parties were requested to file a joint practice note wherein they had to set out the issues for determination. The issues for determination was set out by the parties as follows:

- i. Whether RDJ, as the appointed liquidator of the applicant and second respondent's joint estate, may make an adjustment upon division of the parties' joint estate as provided for in s 15(9) of the MPA;
- ii. In the event that it is found that RDJ may make such an adjustment, whether Mrs. M[...] has made out a case for an adjustment to be made;
- iii. In the event that it is found that Mrs. M[...] has made out a case for an adjustment, the amount to be paid to her, if any.

Section 15(9) of the MPA

[3] Section 15 of the MPA is titled 'Powers of spouses'. Section 15(9) provides as follows:

'When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under s 16(2), and

- (a) That person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

(b) That spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the estate.

The parties' respective contentions

(i) The applicant's case

[4] The applicant informs that the parties were married in community of property on 23 August 1995. The marriage was dissolved by a decree of divorce on 18 April 2018. The order provided, amongst others, for the division of the joint estate. The parties could not agree regarding the division of the joint estate, and on 5 September 2018 RPJ was appointed as the liquidator and receiver of the joint estate to effect the division of the joint estate. RPJ was, amongst others, empowered to 'effect an adjustment upon division of the joint estate in terms of section 15(9)(b) of the Matrimonial Property Act 88 of 1984.'

[5] Mrs. M[...] states that she and her erstwhile husband was afforded the opportunity during the winding up of the estate to buy out each other's half share in the common matrimonial home, the Pangolin Street-property. This property was paid off and no longer encumbered. The parties eventually agreed that the value of the property was R890 000.00. She subsequently offered R805 000.00 and had to pay out an amount that was equal to the half share value of the property. The liquidator, however, made Mrs. M[...] pay the full purchase price of the property. He also accounted the value of the property at R890 000.00 and not R805 000.00, and recorded the second respondent's half share as R445 000.00 instead of R402 500.00.

[6] Mrs. M[...] also contends that certain debts were included in the liquidator's reports that were made in contravention of s 15(9) of the MPA, and an adjustment ought to

be made in her favour in terms of s 15(9)(b) as per the powers of the liquidator. These debts were never discovered during the divorce action, and entails the following:

- i. Half share of Nedbank CC (R44 730.38) being (R22 365.19)
- ii. Half share of Standard Bank (R204 204.09) being (R102 102. 40)
- iii. Half share of Standard Bank (R4 778.78) being (R2 389.40)
- iv. Half share of Vega (R16 700.00) being (R8 350.00).

[7] Other aspects that she lists as flaws in the liquidator's report are (i) the amount of R128 270.12 depicted as legal costs during the divorce where each party was ordered to pay their own costs – no statement of account was attached to provide a breakdown of such costs, and (ii) the provision of a taxable amount of R19 504.21 that is not explained.

[8] As a result of the abovementioned, Mrs. M[...] seeks a declaratory order that Mr. M[...], the 2nd respondent, refunds her the sum of R537 706.61 by which Mr. M[...] was unduly or unjustifiably enriched following RPJ's report.

(ii) The first respondent's contentions

[9] RPJ abides the court's decision.

(iii) The second respondent's contentions

[10] The second respondent, Mr. M[...], avers that both parties wanted to purchase the Pangolin street-property. RPJ informed both parties that the highest offer made by either party would be accepted. Mrs. M[...] made the highest offer, and delivered a

Bank Guarantee. Her offer was accepted. Mr. M[...] contends, however, that the parties agreed that the value of the property, if sold on the open market, would be R890 000.00. The parties were merely 'accommodated' by being provided with the opportunity to buy the property but Mr. M[...] would never have agreed to accepting the lower purchase price to his own detriment. It was therefore agreed that the open market value would be used in the calculation.

[11] Mr. M[...] contends that is reflected in the liquidation and distribution account that Mrs. M[...]’s half share was allocated back to her, and his half share was allocated to him. She remains entitled to only her half share in the joint estate being the value of the assets minus the total liabilities. Her half share was allocated to her. The parties agreed that the open market value would be used in the calculation irrespective of the amount for which the house was sold to the highest bidder of the two.

[12] Mr. M[...] disputes that the report attached by Mrs. M[...], dated 16 September 2020, was the final report furnished by RPJ. He attached a report dated 1 October 2020. Mr. M[...] also denies that he did not make discovery of the debts referred to by Mrs. M[...] and claims that all of his statements were discovered. The debts were incurred prior to the parties divorce and to pay for joint household expenses. He takes issue with the fact that Mrs. M[...] did not claim an adjustment in terms of s 15(9)(b) of the MPA during the divorce whilst she was aware of the debt incurred during the marriage. Mr. M[...] states that Mrs. M[...] claim for adjustment is set out poorly and without any substantiation.

[13] Mr. M[...] alludes that RPJ indicated to the applicant on 2 November 2020 that she should issue a review application if she was so inclined. On 3 December 2020 PRJ informed the parties that no application for review was served as requested, and as a result he made payments in terms of the final report and closed the file. The review application was only issued on 23 February 2021, after payments were made and the liquidator’s file closed.

(iv) The applicant's reply

[14] In reply to Mr. M[...]’s answering affidavit, Mrs. M[...] admits that she received the updated DAA dated 1 October 2020, but denies that she was allocated her half share, that the debts referred to in the founding affidavit were discovered or incurred for the benefit of the joint estate, or that she is liable to pay R64 039.80 to Mr. M[...] as set out in RPJ’s report dated 1 October 2020. Mrs. M[...] also claims that she did seek an adjustment in terms of s 15(9) of the MPA in the divorce action.

[15] Mrs. M[...] reiterates that RPJ did not apply the buying out principle correctly and as a result she is entitled to review and set aside the report.

Discussion

[16] I must state at the onset that it is evident that Mrs. M[...] based her application on the DAA dated 15 August 2020, attached to the report of 16 September 2020, although the final DAA is dated 1 October 2020. She fails to explain why she relied on the erstwhile DAA but merely acknowledges in reply that there was a subsequent amended DAA filed in October 2020.

[17] It is evident that Mrs. M[...]’s request to have RPJ’s report reviewed and set aside is based on two main points. The first is that RPJ erroneously applied the buying in principle. The second is for an adjustment in terms of s 15(9) relating to certain debts incurred by Mr. M[...].

[18] The court was provided with a document titled the Distribution and Allocation Account (the DAA) that was attached to Mr. M[...]’s answering affidavit. This court is not favoured with the liquidator’s account of events. The following is evident from the DAA:

- i. For purposes of calculating the value of the total joint estate assets the valuated value of the Pangolin street-property was used, and not the amount Mrs. M[...] paid for the property;
- ii. The total value of the joint estate assets is R1, 326 715.26. Of these, assets to the value of R678 912.64 are in the hands of Mrs. M[...] and assets to the value of R647 802.62 are in the hands of Mr. M[...];
- iii. The total value of the joint estate liabilities is R1, 515 846.13. Of these liabilities R306 390.67 lies with Mrs. M[...] and the bulk, in the amount of R1, 129 455.46 lies with Mr. M[...];
- iv. The net value of the joint estate is calculated at -189,130.87 and 50% thereof is -94 565.43.

[19] The account correctly reflects that in order to divide the joint estate equally between the parties, taking into account the assets held by each and the total liabilities, that an amount of R387 077.41 have to be contributed by Mrs. M[...].

[20] The account provided by the liquidator further reflects that certain amounts were to be contributed by the respective parties individually in relation to e.g., liquidator’s costs, bank costs, valuation fees etc. The amount to be paid by Mr. M[...] is reflected as R140 710.77 and by Mrs. M[...] as R54 329.19.

[21] The distribution account is then reflected as follows in the DAA:

Due by / to Mr. M[...]	
Purchase of 50% share [of Pangolin street-property]	R 445 000.00
Plus division as above	R 387 087.41
Minus costs as above	R 140 710.77
Plus 50% interest	R 17 376.77
	R 708 753.40

Due by to Mrs. M[...]	
Refund on purchase price	R 360 000.00
Minus division as above	R 387 087.41
Minus costs as above	R 54 329.16
Plus 50% interest	R 17 376.77
	-R 64 039.80

[22] After considering the parties' affidavits, I am of the view that a dispute of fact exists regarding the agreement between the parties concerning the sale of the Pangolin-street property. It is indeed so that Mrs. M[...] owned an undivided half share in the common property, but the sale of the property was agreed to in the context of negotiating the division of the joint estate. The DAA, as it stands, supports Mr. M[...]’s contention in this regard and indicates that the dispute raised is not spurious. It is well-known that parties should not use motion proceedings when

material facts are in dispute.¹ In light of the dispute of fact that arose I am obliged to apply the *Plascon-Evans* principle.²

[23] As far as Mrs. M[...]’s contention that an adjustment had to be effected by RPJ in terms of s 15(9) of the MPA is concerned, I agree with the second respondent that no case was made out for such an adjustment to be made. Although the liquidator’s report dated 16 September 2020 reflects that Mr. M[...] concluded loan agreements in 2004, 2014 and 2015 without it being signed by Mrs. M [...], the said agreements was not placed before this court, neither was a case made out that the joint estate suffered a loss as a result of the transactions concerned. The manner in which the accounts are reflected in the founding and replying affidavits – Nedbank CC (R 44 730.38), Standard Bank (R204 204.09) and Standard Bank (R4778.75) - renders it impossible to determine whether it corresponds with the accounts discovered in the divorce action. The accounts referred to in the liquidator’s report of 16 September 2020 and the DAA of 1 October 2020, are, however, reflected in the discovery affidavit filed by Mr. M[...] in the divorce action. However, in the absence of proof that the joint estate suffered a loss as a result of these transactions, the issue as to whether the accounts were discovered is neither here nor there.

ORDER

In the result, the following order is granted:

- 1. The application is dismissed with costs.**

E van der Schyff
Judge of the High Court

¹ *Da Mata v Otto NO* 1972 (3) SA 858 (A) 865G-H.

² *Plascon-Evans Paints Ltd t/a Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635D.

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Mr. M. J. Chipu
Instructed by:	Chipu Attorneys
For the second respondent:	Adv. Z. Marx du Preez
Instructed by:	Shapiro & Ledwaba Inc.
Date of the hearing:	16 May 2022
Date of judgment:	25 May 2022