Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 15515/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGE: YES / NO

(3) REVISED: YES / NO

18/12/2023
DATE

SIGNATURE

In the matter between:

S[redacted] M[redacted] **Applicant**

and

PHILLIP JORDAAN N.O. **First Respondent**

E[redacted] M[redacted] **Second Respondent**

Heard: **05 October 2023**

Delivered: This judgment 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. The date and time for hand-down is deemed to be **10h00** on **18 December 2023**.

Summary: Marriage – In community of property – Divorce – Process of liquidation and powers of liquidator — Adjustment in terms of s 15(9)(b) of Matrimonial Property Act 88 of 1984, s 15(9)(b) – Can be made and ordered by court, after decree of divorce and in the process of dissolution of the joint estate.

ORDER

It is ordered that: -

1. The application is dismissed.

2. The applicant is to pay the costs of the application on a scale as between attorney and client.

3. Such costs shall not form part of the liabilities or expenses of the joint estate and shall be borne exclusively by the applicant.

JUDGEMENT

LE GRANGE AJ:

[2] Amid the dissolution of the joint estate of divorcees, i.e. the applicant and the second respondent, the former approached this Court for an order:

(a) Removing the first respondent, the appointed liquidator and receiver ('liquidator') from office; and

(b) Staying the division of the joint estate; and eviction of the applicant from the common home, 'pending finalisation of these proceedings'.

Grounds for removal

[3] The applicant seeks removal on the basis that the liquidator is acting beyond his powers and demonstrated 'over biasness' in his modus of bringing the joint estate to conclusion. To this end it relies on certain incidents, i.e.:-

(a) A judgement by Manamela AJ where reference was made to the liquidator's incorrect method in dealing with the sale of the common home;

(b) The liquidator's failure to consider the applicant's submission to the 'final draft' report / liquidation and distribution account, while he (admittingly) only considered the second respondent's submission.

(c) The liquidator demanding eviction of the applicant from the common home ('house').

(d) The liquidator adding the wasted expenses, incurred on termination of the transfer attorneys' mandate, to the account of the applicant.

(e) The liquidator demanding repayment of monies in excess of R 2 million.

Process of liquidation and powers of the liquidator

[4] In issue is the age-old dilemma which liquidators faces daily when the court 'shifts' the duty to divide a joint estate, to a liquidator – the latter not similarly clothed with all the powers and authority – resulting in applications whereby liquidators seek to either be released or be granted more power.

[5] Before this Court turns to the applicant's contentions – the powers of the liquidator and the process of bringing the joint estate to conclusion needs clarification.

[6] Essential to this process, in instances of disagreement, is the appointment of a liquidator (also called a joint liquidator, receiver or curator) the purpose of whom is to take control of the joint estate as administrator, to accumulate the assets and liabilities thereof and to ultimately dissolve it through a fair distribution of the nett assets between the divorcees. The inherent power of the court to appoint such an officer to assist in the division goes as far back as in the matter of *Gillingham v. Gillingham*, 1904 T.S. 609 where INNES C.J., stated: '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 some one (whether he is called liquidator, receiver, or curator-perhaps curator is the better word) to collect, realise, and divide the estate.'

[7] To attain same, a divorce court normally bestow wide powers upon the liquidator to search for, secure and value these assets, and validate any and all liabilities. *In casu*, the decree of divorce (incorporating a settlement agreement) provide as follows:-

'In settlement of all proprietary claims which the parties have or may have against one and another arising out of the marriage in community of property, the parties agree as follows:

4.1 The joint estate of the parties shall be divided;

4.2 Mr Phillip Jordaan … is appointed as Liquidator and Receiver … to divide the joint estate of the parties with the Powers and Duties as set out in ANNEXURE "EM2" hereto;'

[8] Annexure "EM2" (*inter alia* relevant hereto) provide that:-

'1. The Liquidator shall take control over the joint estate and shall enjoy all the powers as administrator thereof. Without derogating from the generality of the forgoing, the Liquidator shall also be entitled:-

...

1.3 to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets and liabilities of the joint estate;

…

1.15 to distribute the net assets of the joint estate in accordance with paragraphs 2 and 3 hereinunder;

…

1.19 to sell any assets to either the plaintiff or the defendant for a price that he deems to be the true market price of such assets;

…

1.23 to apply to this court for any further directions as he shall or may consider necessary;

1.24 to institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever court it shall be appropriate to bring such proceedings.

1.25 to instruct and appoint attorneys and/or council to institute proceedings on his behalf for the purposes of obtaining the delivery of any assets

alleged to be vested in the joint estate and to obtain such other or alternatively relief as the circumstances may require …;

…

1.33 *to allocate, in his discretion* both assets and liabilities between the parties.

3. The division of the net assets referred to in paragraph 1.15 above shall be in equal proportions between the plaintiff and the defendant but subject to paragraph 4 below.

4. Any losses suffered by the joint estate as a result of the wrongful behavior of the parties in dissipating the joint estates assets, shall be borne exclusively by such party and a distribution and division of the assets of the joint estate or the proceeds thereof, as the case may be, shall accordingly be subject to adjustment in accordance with the *Liquidator's discretion*.' Emphasis added.

[9] Added to this, is the remedy in Section 15 (9) of the Matrimonial Property Act[1] ('act') which provides:-

'When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) …, and-

…

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent … 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 joint estate*.' Emphasis added.

[10] Subsection 2 and 3 of section 15, contain codified acts which is *per se* regarded as unlawful, for reason thereof that it is in essence made at the expense of the other spouse.

[1] 88 of 1984

[11] It seems, from the flynote and headnote or summary of the reported judgement of *KM v TM* 2018 (3) SA 225 (GP), that such an adjustment 'can only be ordered by court when granting divorce' and that the 'Receiver/liquidator cannot itself decide whether adjustment to be made'. According to my understanding of the body of the judgement this was not exactly found. It was rather a case that no adjustment can be made for loss suffered post-divorce; and that an adjustment can only emanate from an order.

Adjustment post decree of divorce

[12] Be that as it may, this Court is of the following view. An 'adjustment' is an absolute necessity and an extremely important statutory remedy which, this Court submit, address the shortcomings of the common law *actio pauliana utilis* which fell short of practicability as it: (i) is an action which can only be institutes post-divorce; (ii) has at its core a difficult to prove element i.e. of fraud (oppose to a *per se* codified 'unlawful act'); and (iii) in most instances left the innocent spouse empty pocket due to (not just expensive litigation but) the inability to recuperate the loss from the offending spouse or any third party which has long departed with the riches.

[13] The question of whether an 'adjustment' could only be ordered 'upon divorce', becomes extremely relevant as these losses in most instances only becomes visible *after* the decree of divorce – i.e. when the bond has finally shattered and the party who held the joint purse has to account for, or lay bare, his/her (past) actions, to a liquidator or the court.

[14] Interpreting section 15(9)(b), the Afrikaans text which was signed into operation need be considered. It provides:

> '… moet verrekening ten gunste van die ander gade, by die verdeling van die gemeenskaplike boedel, geskied.

[15] Applying the 'golden rule' – the ordinary words used in the section does not provide that an adjustment can only be granted 'upon divorce'.

[16] If it was the intention of the legislature to limit this remedy to instances up until the decree of divorce it would have explicitly used the words '*deur* egskeiding' or '*by* egskeiding' as in sections 3 and 9 of the same act, as opposed to 'by die verdeling'.

[17] The words 'by die verdeling van die gemeenskaplike boedel' should according to this Court be widely interpreted to mean *in the process of the division of the joint estate* which starts with the decree of divorce and ends after actual distribution.

Liquidator's power of adjustment

[18] The act (following the discretion) to make an adjustment, just like the discretion and act to deny a third party's claim against the joint estate, starts in the mind of the liquidator after proper investigation, (*in casu* as intended in point 4 of 'EM2' *supra*) and ends up, after consideration of all submissions, in the liquidator's account (also called a report or liquidation and distribution account) – which in itself has no legal force. If all parties accept same that is normally the end of it. If not, the liquidator (or any affected party) should approach the court to ensure finality. The court, having the privilege of further oral and other evidence, should then either confirm, amend or clarify the account and grant, where necessary further and alternative relief to enable the liquidator to bring the joint estate to practical conclusion.

[19] Back to the applicant's contentions.

Judgement of Manamela AJ

[20] It cannot be disputed that the learned Judge questioned the liquidator's discretion i.e. his method utilised to realize the sale of the house.

[21] It can however also not be disputed that the learned Judge, notwithstanding the applicant's attack on the liquidator and his alleged bias in that matter, elected to retain the liquidator in office and to provide him with a more suitable method of realizing the sale.

[22] This leaves this Court with an inescapable conclusion that the liquidator was found to be fit and proper notwithstanding – which does not support the contention made.

Failure to have regard to applicant's submissions

[23] The applicant is of the view that the liquidator was biased as he (on his own admission) only had regard to the submissions of the second applicant.

[24] This allegation is taken out of context and proportion.

[25] After inviting the parties to make submissions to the final draft, the liquidator addressed a letter to both parties on 23 January 2023 stating:-

> 'Kindly note, I *have received no further submissions from* Mr M[redacted] on the Final Report other than answered in the attached response dated 8 December 2022.' Emphasis added.

[26] On 30 January 2023, on receipt of a letter from the applicant's attorney, pointing the liquidator to the fact that written submissions were made and delivered to the liquidator, which went unaddressed, the liquidator

responded three days later (on 2 February 2023) by addressing these submissions.

[27] This Court cannot, with the explanation tendered by the liquidator[2] which seems *bona fide* and went unchallenged in the replying affidavit, find that the liquidator's error could or should be elevated to overt biasness and favouritism towards the second respondent.

The liquidator demanding eviction

[28] It is common cause that the common home ('house') was secured by the second respondent (for herself and the children) who purchased the applicant's share at an auction between the parties, and that the applicant, notwithstanding transfer, refuse to relinquish possession.

[29] The contention goes that the liquidator's conduct, to demand eviction of the applicant from the house, insinuates that he is mandated and/or instructed by the second respondent – leaving him biased towards the second respondent.

[30] This contention fails to have any regard to the process of liquidation, the purpose of the liquidator, and his powers and duties as further set out in provisions 1.19, 1.20, 1.24 and 1.25 in para 6 *supra*.

[31] This contention further disregards the basic common law principle that a seller is obliged to give *vacua posessio* to a purchaser upon a sale – the liquidator *in casu* stepping into the shoes of the seller(s), being obliged to ensure vacant possession to the second respondent. This

[2] Paras 108 to 110 of the answering affidavit.

Court finds the matter of *Van Onselen NO v Kgengwenyane* 1997 (2) SA 423 to be clear and good authority on this point.

[32] The applicant's view, confirmed in argument, that he has a constitutional right to housing and intend on occupying the house for as long as the liquidation is not finalised, is worthy of serious concern especially in this instance where the applicant confirmed that he willingly sold (his portion of) the house, and more importantly confirmed that he has alternative housing (residing where he works).

[33] This also brings this Court to prayer two, which is flawed in itself and cannot be granted.

Expenses of the former transfer attorneys (regarding the wasted costs occasioned), bestowed upon the applicant

[34] The contention goes that the liquidator erred when he deducted VHI Attorneys wasted costs from the applicant's share of the net worth of the joint estate. Jurisprudentially more correctly – that the liquidator, has presented it in his account that he has exercised his discretion to deduct these wasted costs from the applicant's portion of the net worth of the joint estate.

[35] It is not in dispute that the transfer attorney's mandate was cancelled at the sole instance and request of the applicant.

[36] The liquidator's decision then in the exercise of his discretion[3] to allocate this liability in his account to the applicant, then only seems logical and can also not amount to biasness.

[3] See para 4 i.e., provision 1.33 and/or 4 of the Powers and Obligations of the Liquidator as set out in "EM2"

Repayment of R 2 million

[37] The common cause facts relating hereto are as follows:

[38] The applicant retired in 2014 and received his pension consideration, in excess of R 2 million on 17 March 2015 which was paid into his Cheque Account.

[39] Summons commencing divorce proceedings dates 17 June 2015.

[40] On 3 February 2017, the applicant paid an amount of R 2 million from this account into his sister's account (Mrs E[redacted] M[redacted]).

[41] On 9 June 2017, an order in terms of Uniform Rule 43 was granted against the applicant to contribute to maintenance of the second respondent and the children.

[42] The decree of divorce dates 24 April 2018.

[43] The contention goes that the liquidator is biased because he goes beyond his powers in seeking repayment of this R 2 million, which is unlawful for reason thereof that it is pension money and does not form part of the joint estate. He states:-

> 'I have been advised … it is trite in pension law litigation in divorce matters that pension benefits that were realized and/or *cashed out* before the date of divorce do not form part of the assets of the joint estate. *Please refer to Eskom Pension and Provident Fund v Krugel and Another* [2011] ZASCA 96.
>
> By second Respondent's concession during her submission … I cashed on my pension fund interest and according to the authority … *all my pension interest so cashed before the date of divorce do not form part of my joint estate as at the date of divorce.*' Emphasis added.

[44] The applicant's reliance upon the *Eskom* matter is misplaced for various reasons, the most important of which is that the *Eskom* matter deals with

a pension consideration which was, upon resignation and before divorce, ‘not cashed out’ but deferred in accordance with the rules of the fund.

[45] In *casu*, the pension consideration was paid out in cash and thus immediately became part of the (monetary) assets of the joint estate to be treated (by the liquidator) as any other asset in the division of the joint estate and does the liquidator’s decision again make sense.

Conclusion

[46] Considering the above carefully this Court is not at all satisfied that it is desirable that the liquidator should be removed. Especially in this instance where the objection against the liquidator is based upon accusations of overt biasness in instances where the liquidator has merely applied his discretion coupled with the fact that the final account has no final effect and legal force unless enacted in an order of court as aforesaid, which grants the applicant a right of recourse against the discretion.

[47] This Court is of the view that the attack on the liquidator and his powers is based upon wrong conclusions, ignorance of the law and a disregard of the terms agreed upon in the settlement, followed by an attitude of obstructiveness.

Order

[48] In the result the following order is made:-

1. The application is dismissed.

2. The applicant is to pay the costs of the application on a scale as between attorney and client.

3. Such costs shall not form part of the liabilities or expenses of the joint estate and shall be borne exclusively by the applicant.

AJ le Grange

Acting Judge

APPEARANCES

APPLICANT:	T Molefe
	Instructed by T Molefe Attorneys
FIRST RESPONDENT:	Adv. L Pearce
	Instructed by F A Steyn Attorneys
SECOND RESPONDENT:	Adv. Z Marx Du Plessis
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