IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR142/2022

In the matter between:

CLIFTON VERSFELD **APPELLANT**

and

LYNETTE DOREEN GILLOW **FIRST RESPONDENT**

NEIL DAVID BUTTON N.O. **SECOND RESPONDENT**

ORDER

On appeal from: Hadebe J (sitting as court *a quo*):

Save for setting aside that part of the order that refers to the debatement of the account, the appeal is dismissed with costs.

JUDGMENT

Delivered on: 29.10.23

Poyo Dlwati JP (Henriques J and Voormolen AJ concurring)

[1] This appeal concerns the issue of whether the estate of the universal partnership that existed between the appellant and the first respondent falls to be liquidated in terms of the settlement agreement and the liquidator's (the second respondent) mandate or in terms of the second respondent's mandate only.

[2] On 23 June 2021 Hadebe J granted an order in the following terms:

'(a) The first respondent's counter application is dismissed with costs;

(b) It is declared that upon a proper interpretation of the settlement agreement concluded between the applicant and the first respondent dated 30 November 2016, clause 19 thereof falls to be interpreted to mean that the second respondent must only liquidate those assets of the universal partnership in respect of which no provision has been made in the settlement agreement for the retention thereof by either of the parties;

(c) The second respondent is directed to sell the Dorcliff property (clause 3 of the settlement agreement) and the Breede property (clause 4 thereof) by private treaty or by public auction with the object of obtaining the best price thereof. If a sale of either or both of the said properties is not able to be achieved, then the second respondent shall cause a market valuation of such property/properties to be done as at that date and award the said property/properties in equal shares to the applicant and the first respondent;

(d) The second respondent is directed to cause the accounting to be done as contemplated by the provisions of clause 7 of the settlement agreement and incorporate the results of such accounting in the first liquidation and distribution account;

(e) The second respondent is directed to prepare the first liquidation and distribution account in accordance with the provisions of the settlement agreement, submit such account to the applicant and the first respondent who are directed to debate the account with the second respondent and in the event of any dispute arising therefrom, all parties are granted leave to approach this court for further directions. Within one (1) month of the finalisation of the first liquidation and distribution account if one party is owed money by another party, that party who is indebted to the other is directed to make payment of such amount to the other party;

(f) The first respondent is directed to pay the costs of this application and such costs shall be brought into account by the second respondent in the liquidation and distribution account

and debited against any amount owing to the first respondent but in the event of the second respondent opposing it, then the first and second respondents shall be jointly and severally liable for the costs of the application, the one paying the other to be absolved'.

[3] Leave to appeal was granted by the court *a quo* on 27 January 2022.

[4] The background to the litigation was that the appellant and the first respondent were in a universal partnership which terminated during November 2012. On 30 November 2016 the parties concluded a settlement agreement to facilitate the dissolution of the universal partnership assets. Clause 15 of the settlement agreement provided that the respective attorneys would act in good faith and co-operate with one another in order to bring about a fair dissolution of the universal partnership. Clause 19 of the settlement agreement reads:

'(a) If for any reasons any of the attorneys find that he is unable to agree upon or carry out any of his functions in terms of this agreement then attorney Neil Button of Stowell and Company shall be appointed as sole liquidator to liquidate the Universal Partnership.'

[5] Indeed, some disagreement arose between the parties' respective legal representatives relating to the dissolution of the universal partnership and that necessitated the appointment of the second respondent as the liquidator as provided for in the settlement agreement. After his appointment, the second respondent sent to the parties a document headed 'appointment of liquidator agreement' (letter of appointment), containing the terms of his mandate, which the parties both signed.

[6] The letter of appointment gave the second respondent various powers and duties including:

'1.1 To take possession of all of the assets, both movable and immovable, in the joint estate; to collect all debts owed to the estate and, to determine and discharge the estate liabilities;

…

1.4 To sell any asset either by public auction or by private treaty to whomsoever it may appear to be most beneficial, allowing the parties hereto to bid or tender, whenever the division of such assets cannot conveniently or advantageously be effected;

…

1.6 Prior to the preparing of the Final Account, to hear any representation the Liquidator might deem necessary and in relation to the manner in which the assets can or should be advantageously divided.'

[7] In a letter addressed to the parties, the second respondent advised the parties through their legal representatives that he intended to proceed with the liquidation of the universal partnership assets in line with the settlement agreement and if its terms were impossible to perform, he would use the wide mandate as contained in the appointment letter. As a result, the second respondent prepared a first liquidation and distribution account and sent it to the parties' legal representatives on 27 September 2019. He requested them to provide their comments to the account by 11 October 2019. The appellant and the first respondent sent their objections to the second respondent on 9 October 2019.

[8] In a letter dated 21 October 2019, the second respondent invited the parties' legal representatives to meet and make proposals to him failing which, he would proceed to liquidate all assets belonging to both parties by way of public auction and to liquidate the Allan Gray Investment and that all funds would be paid into his trust account. The parties' legal representatives were not able to agree and the second respondent advised the parties that he would proceed to liquidate the estate as per his account unless one of the parties interdicted him, through a court order, from doing so. No agreement could be reached and the first respondent was not in agreement with how the second respondent intended to liquidate the estate, hence this application.

[9] The first respondent's contention was that the letter of appointment did not replace the settlement agreement and ought to be read in conjunction with it. Where certain clauses were not in line with the settlement agreement, then those clauses ought to be rectified to the extent that the second respondent ought to deal with those assets that are not provided for in the settlement agreement, so the contention went. According to the first respondent, this contention seemed to have been the appellant's understanding earlier in the engagements, even though that seemed to have changed as reflected in an email addressed to the second respondent on 27 November 2019.

[10] The appellant opposed the application. His contention was that the second respondent's mandate novated and overrode the settlement agreement and the second respondent was empowered and obliged to act in terms of his mandate only. Furthermore, in the appellant's view, the second respondent had dismissed the parties' objections to the liquidation and distribution account in his letter dated 15 January 2020. Either party then ought to have approached the court within 14 days of the date of such ruling which ought to have been no later than 29 January 2020. Accordingly, as the application was only launched on 12 February 2020, it was out of time and as there was no application for condonation, it ought to have been dismissed.

[11] The appellant, simultaneously with his opposition to the application, launched a counter-application where he sought an order directing the second respondent to act in terms of the letter of appointment as liquidator to the exclusion of the prior settlement agreement concluded between the parties. He also sought an order that the second respondent be directed to implement the provisions of the first and final distribution account prepared by him and marked as Annexures 'F3' to 'F10' to the first respondent's founding affidavit. It was on this evidence that the court *a quo* found in favour of the first respondent.

[12] In this appeal, the appellant takes issue with whether the application was lodged timeously; whether the estate ought to be liquidated in terms of both the settlement agreement and the second respondent's mandate or the second respondent's mandate only and whether the liquidation and distribution account ought to be rectified and debated.

[13] With regard to the issue as to whether the second respondent ought to liquidate the universal partnership in terms of the settlement agreement and his mandate or his mandate only, it is important to take note of what was said in *University of Johannesburg v Auckland Park Theological Seminary and Another*,[1] and that is '[a] court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract'. Our law reports are replete with cases dealing with the interpretation of contracts and documents and I do not intend traversing them all save where necessary. What is relevant for present purposes is what was stated in *Hoffmann and Carvalho v Minister of Agriculture*:[2]

'Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the Court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended; except, of course, where parties have not observed statutory formalities required in certain contracts, such as in a contract for the sale of fixed property.'

[14] It is convenient to refer to some clauses of the settlement agreement in order to determine the issue at hand. Clause 2(b) of the settlement agreement

[1] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) para 66. (Footnote omitted.)
[2] *Hoffmann and Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) at 860.

reads: 'The parties agree that the universal partnership has come to an end with effect from the dissolution date and that the assets of the partnership, after payment of any debts of the partnership, and any other adjustments made in accordance with the terms of this agreement, shall be divided amongst the parties as hereinafter set out'. As held in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,[3] the purpose of the provision must be taken into consideration when interpreting documents. From clause 2(b), it is evident that the settlement agreement was intended to govern the liquidation of the assets of the universal partnership. In this regard, I agree with what the court *a quo* said, namely: 'a reading of the agreement clearly indicated that that was never the intention of the parties (reference being to the disregard of the parties' wishes), hence the differentiation between the assets that are to be sold and those to be retained by the individual parties for their sole and exclusive ownership'.[4]

[15] From there, one has to closely examine clause 19 of the settlement agreement. In this regard, I agree with what the court *a quo* held when it said that the only reason why clause 19 came into operation was the failure of the parties' attorneys to agree on the manner in which the dissolution should be handled. As clause 19 has been quoted above, it is evident from it that the second respondent's role was to step into the place of the attorneys and would only deal with issues that were not agreed upon.

[16] Therefore, the second respondent, in my view, ought to liquidate the partnership assets in terms of the settlement agreement and where the attorneys ought to have made a decision and there was no agreement by the parties in relation to the distribution of assets, then the second respondent must make that decision. The second respondent's mandate would thus be limited to what I have

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[4] Paragraph 19 of the judgment at page 136 of the record.

alluded to above. In my view, there will therefore be no need for the rectification of the second respondent's mandate save that the mandate must be read and interpreted together with the settlement agreement.

[17] For the sake of completeness, I will deal with the issue whether annexure 'M', being the letter addressed by the second respondent to the respective parties' legal representatives, to the appellant's founding affidavit constituted the ruling of the second respondent. In light of the finding I have made with regard to the settlement agreement, the second respondent would then be obliged to revise the liquidation and distribution account and thereafter present it to the parties again as per the settlement agreement and his decision, where no decision was made. To the extent whether annexure 'M' was the second respondent's ruling, I agree with the court *a quo* that it was not and could not have been his final ruling. This as the court *a quo* held, is evident in the penultimate paragraph of annexure 'M' which reads, 'in the absence of the willingness to settle, either the liquidator must proceed to liquidate all the assets of the estate immediately, or the parties must now agree that either the liquidator or one of the aggrieved parties must bring an urgent declarator to court in which case both parties must place the liquidator in funds to proceed.' Since two options were presented, that obviously could not have been a final ruling under the circumstances as any party could choose either of the two options. It must follow then that at that stage, there was no limitation to the time frames within which the application ought to be launched. Hence, in my view, it was launched timeously.

[18] To the extent that the court *a quo* made an order that the second respondent's mandate ought to be rectified, in my view no case has been made out for rectification. If one considers the requirements for rectification as set out

in *Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd*,[5] these have not been met by the first respondent. There was also no prayer for rectification before the court *a quo*. It follows that to the extent that the court *a quo* ordered the rectification and the debatement of the account which was not provided for in the settlement agreement, that part of the order ought to be set aside.

[19] As the first respondent was substantially successful in this appeal, there is no reason why the costs should not follow the results.

[20] Consequently, the following order shall issue:

'Save for setting aside that part of the order that refers to the debatement of the account, the appeal is dismissed with costs.'

Poyo Dlwati JP

[5] *Propfokus 49 (Pty) Ltd and others v Wenhandel 4 (Pty) Ltd* [2007] 3 All SA 18 (SCA) at 21-23.

APPEARANCES

Date of Hearing	: 21 April 2023
Date of Judgment	: 29 September 2023
	(delivered electronically at 11:30)
Counsel for Appellant	: Mr De Beer SC
Instructed by	: G M Parker Attorneys
Counsel for First Respondent	: Mr Hollis SC
Instructed by	: John Dua Attorneys