LOM Business Solutions t/a Set LK Transcribers/LR

IN THE SOUTH GAUTENG HIGH COURT

JOHANNESBURG **CASE NO:** 19549/05

DATE: 15/09/2009

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

pp VAN OOSTEN J

14 October 2009

In the matter between

A.M.G. **APPLICANT**

and

LOUIS EDWARD DEFRIES NO **1ST RESPONDENT**

M.G. **2ND RESPONDENT**

J U D G M E N T

VAN OOSTEN J: The litigation between the parties stems from a divorce action between the applicant (Dr. G.) and his erstwhile spouse, Mr. G., who is the second respondent in this application. Their marriage was dissolved on 14 March 2003 by an order of this Court (the 2003

court order). The 2003 court order incorporated a settlement agreement that had been entered into between the G.'s. The settlement agreement provides for the equal division of the assets in the joint estate between the G.'s and for the appointment of a liquidator to realise the assets of the joint estate for the equal distribution thereof between the G.'s.

On 2 July 2003 the first respondent was appointed the liquidator of the joint estate who derived his powers and functions from the provisions of the settlement agreement and therefore the 2003 court order. Extensive litigation between the parties ensued. For present purposes it is only necessary to refer to the application which is relevant to the matter now before me.

On 30 August 2005 Dr. G. launched an application against the liquidator, Mr. G. and the liquidator in which he sought certain declarators in regard to an immovable property which formed part of the joint estate. The liquidator in turn, in a counter application *inter alia* sought a declarator in relation to the shareholding and members' interests in certain companies and close corporations and further that Dr. G. had been in contempt of the 2003 court order. The relief claimed by the liquidator in the counter application by consent between the parties was referred to trial by Nichols AJ. Pleadings were subsequently exchanged and that matter has now been enrolled for hearing on 7 October 2009 (the action). On 2 September 2009 the liquidator launched the present application under the heading Notice of Motion, in which notice is given that application will be made on 15 September 2009 for an order in the following terms:

1.1 Ordering the applicant to make available for the inspection of the first respondent in terms of Rule 35(6) within two days of the date of this order the documents requested in the first respondents notice, served on the applicant's attorneys on 12 August 2009 and filed on 13 August 2009.

1.2 Ordering the applicant to deliver within five days of the date of this order, a reply to the first respondent's request for particulars for trial, delivered and on and dated 4 August 2009.

1.3 Declaring that.

1.3.1 As between the applicant and the second respondent and for the purposes of the agreement of settlement and on a proper construction thereof, the various shares and members interests referred to in clause 4 of the agreement are under the first respondent's control.

1.3.2 Irrespective of the provisions of the agreement of settlement and from an objective point of view the various shares and members interests referred to in clause 4 of the agreement are under the first respondent's control.

1.4 Ordering.

1.4.1 In the event of the second respondent not opposing this application the applicant to pay the costs of this application.

1.4.2 In the event of the second respondent opposing this application the applicant and the second respondent to pay the costs of this application jointly and severally, such costs to include the costs occasioned by the employment

of two counsel.

1.5 Granting further and/or alternative relief.

Notice is further given to Dr. G. or Mr. G., should they wish to oppose the application, firstly, to deliver notice to oppose by 12h00 on 4 September 2009 and, secondly, to deliver answering affidavits by 12h00 on 7 September 2009. No opposing affidavit by and or on behalf of Dr. G. was filed. On Friday 11 September 2009 late in the afternoon an envelope containing photostat copies of 60 of the 68 documents referred to in prayer 1.1 of the notice of motion, as well as a document under the heading Applicant's Reply to the First Respondent's Request for Further Particulars for Trial, dated 4 August 2009, was served on the liquidator's attorneys. I will revert to these documents later in the judgment.

At the hearing before me Dr. G. was represented by senior counsel, Mr *Burman*. Mr *Burman* for the reasons I will presently deal with *in limine* sought an order striking the matter from the court roll, alternatively postponing the application with an appropriate order as to the payment of costs. The application was opposed by Mr *Subel* who with Mr *Dison*, appeared on behalf of the liquidator.

I turn now to the grounds advanced by Mr *Berman* in support of the application for striking the matter from the roll. Firstly, and importantly I was informed by Mr *Burman* that the G.'s have in the meanwhile settled all aspects concerning the division of the joint estate in terms of a written agreement of settlement. This in fact is the settlement agreement referred to in prayer 1.3 of the present

application, a copy of which forms part of the papers before me. It is common cause that the liquidator was not a party to the settlement. His attitude I am informed is that whatever settlement may have been concluded between the G.'s does not affect him in the exercise of his duties pursuant to powers granted to him in terms of the 2003 court order. It is for this reason that the liquidator persists in the continuation of the trial of the action to which the relief sought in prayers 1.1 and 1.2 relates. Dr. G. on the other hand is of the view that the issues to which the action pertains have now become settled and that they accordingly are no longer alive.

This brings me to the contentions raised by Mr *Burman* concerning the procedure followed by the liquidator in launching the present application. Firstly, he submitted that the application was not brought as a purely interlocutory application. The relief sought in prayer 3 concerns a material substantial issue and therefore he submitted is anything but interlocutory. The liquidator having chosen to launch the application should therefore have utilised the long form of Notice of Motion which would have afforded the applicant the opportunity to oppose the application and to seek certain relief by way of a counter application. The liquidator he finally submitted was not entitled to do so in the absence of a prayer seeking the court's indulgence to abridge the time periods provided for in the Rules. Had the applicant been afforded such an opportunity he would have availed himself of the right to file an answering affidavit and to institute a counter application based on the recent settlement I have

already alluded to. That being so counsel concluded the matter was improperly brought and should therefore be struck off the roll with an order aimed at holding the liquidator personally liable for payment of costs.

Mr *Subel* submitted that the application is an interlocutory application as far as the relief sought in prayers 1.1 and 1.2 is concerned. The relief sought in prayer 1.3 he further submitted is incidental to the issues in the main action which the liquidator accordingly was entitled to seek by way of an interlocutory application. The liquidator merely by way of courtesy made provision for the filing of an answering affidavit within an abridged time frame but that counsel submitted, could not and did not detract from the true nature of the application which is and remains an interlocutory application.

The starting point in my view is to consider the nature of the disputes in the main action, as they presently stand on the pleadings. The liquidator was clearly entitled to seek the relief sought in prayers 1.1 and 1.2 by way of an interlocutory application. Mr *Burman* did not take issue with this aspect. The difficulty arising however concerns prayer 1.3 of the application. It seeks a declarator in respect of the settlement agreement that has recently been entered into. This quite obviously is not the way to introduce the settlement and its proper interpretation into the action. The settlement is not dealt with in the pleadings at all. Prayer 1.3 therefore introduces a completely separate issue which does not arise from the pleadings. The proper way of introducing a settlement is for the party relying on it to amend the

pleadings accordingly. This as I have alluded to was not done by either party. The recent settlement is neither “subordinate” nor “accessory” to the issues in the action within the meaning of Rule 6(11) (see *Massey Ferguson SA Limited v Ermelo Motors Pty Ltd* 1973 (4) SA 206 (T) 214G).

I am accordingly unable to find that the relief sought in prayer 1.3 is “incidental” to the relief sought in the action, but even assuming it to be incidental thereto the liquidator has elected to launch this application by way of motion proceedings and not only that, he has without seeking the authority of this court to do so, unilaterally imposed abridged time limits within which further procedural steps are to be taken. No urgency is alleged nor has a case for urgency been made out. A party cannot without more ado adapt the Rules of court to his or her own advantage without making out a case in support thereof.

Mr *Subel* disavowed any further reliance on the relief sought in prayer 1.3 but the change of stance at this belated stage does not avail the liquidator. The applicant was brought to court on the Notice of Motion as it stands which at least as far as the relief sought in prayer 1.3 is concerned, was irregular. It follows that the relief sought in prayer 1.3 need not be considered any further by this court.

Mr *Burman* submitted that a finding in the nature of the one I have just made must put an end to the application as a whole. In support hereof counsel relied on the principle that piecemeal determination of issues usually will be dissallowed. In my view the principle does not find application on the facts of the present matter.

The liquidator was clearly entitled to seek the relief sought in prayers 1.1 and 1.2 by way of a simple interlocutory application. As much was readily conceded by the applicant who, as I have alluded to, as late as Friday afternoon, purported to comply with the request.

Considerations of fairness and justice require that prayers 1.1 and 1.2 be considered separately from prayer 1.3. I cannot see that this will prejudice the applicant in any way nor has any possible prejudice been alleged. This brings me to Dr. G.'s purported compliance. Firstly, it is common cause that the way in which copies of the documents referred to in prayer 1.1 was furnished, technically speaking, did not constitute proper compliance with the provisions of Rule 35 (6) which requires a response by way of a Form 14 notice.

In my view there has been substantial compliance with the Rule albeit in a different form. Copies of eight of the 68 documents were not provided but I accept Mr *Burman's* assurance that this merely resulted from an oversight which of course can easily be rectified. On the other hand the copies of the documents were delivered out of time and it follows that the liquidator was entitled to launch the application to compel. It only remains to deal with the costs concerning prayer 1.1 to which I will revert later in the judgment.

Next, I turn to the further particulars for trial to which prayer 1.2 relates. Mr *Burman* submitted that a reply was filed and that if still not satisfied with thee reply, the liquidator was enjoined by the Rules to take the next procedural step which was to seek an order for further and better particulars. I am unable to agree. It is merely

necessary to refer to the reply to the particulars sought in paragraphs 1 to 18 of the request for further particulars for trial. It reads as follows:

> Ad paragraphs 1 to 18 of the request.
>
> It is not necessary to reply to these requests since the requests relate to issues which have now become settled and are no longer applicable.

The reply quite clearly is not a reply at all – the reason advanced for the refusal to furnish the requested particulars flows from the alleged recent settlement which as I have dealt with, has not been introduced into the pleadings. In the absence thereof the applicant is not entitled to refuse to reply to those requests. The liquidator accordingly is entitled to an order to compel the furnishing of the particulars sought in prayer 1.2 relating to paragraphs 1 to 18 of the first respondent's request for further particulars for trial.

Finally, as to the costs of this application, a number of considerations arise. The liquidator irregularly launched the application for the relief sought in prayer 1.3 by way of an interlocutory application. Dr. G.'s opposition to the relief sought in prayer 1.3 was fully justified and moreover reasonable. Dr. G. has substantially complied with the relief sought in prayer 1.1, albeit only after the application was launched. The liquidator is successful in obtaining the relief sought in prayer 1.2. That however in my view, in the circumstances of this case, cannot be considered as

constituting substantial success. On the whole the considerations for and against the respective parties in my view, are very evenly balanced. Much will eventually depend on the effect of the recent settlement on the continuation of the trial of the action. I am obviously in the absence of further information, not in a position to express any views in this regard. In view hereof I have given serious consideration to reserving the costs for determination by the trial court. In view of the other considerations I have mentioned I have come to the conclusion that it would not be proper for me to saddle another court with the issue of costs. In the exercise of my discretion I have decided that it would be fair and just if each party be liable for payment of his or her own costs.

In the result I make the following order:

1. The applicant [A.M.G.] is ordered to deliver within five days of the date of this order a reply to paragraphs 1 to 18 of the first respondent's request for particulars for trial delivered on and dated 4 August 2009.
2. Each party is to pay his/her own costs.
