REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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

_____ _____
DATE SIGNATURE

CASE NUMBER: A3052/2015

In the matter between:

C. J. L. APPELLANT

and

A. C. S. RESPONDENT

JUDGMENT

CHAITRAM AJ:

[1] The issue for determination in this appeal is whether the court a quo was correct, on the facts, to grant an application ordering the appointment of a Receiver and Liquidator to divide the joint estate of the parties four years after their divorce.

[2] The appellant was the respondent in the application in the court below, and the respondent was the applicant. I will refer to the parties as appellant and respondent.

[3] The key facts are the following:

[3.1] The appellant and respondent had been married to each other in community of property and had divorced in the former Central Divorce Court on 24 August 2009. The court's order in relation to the proprietary consequences of the marriage was simply that the joint estate be divided. The court order went on to provide for an endorsement of the appellant's pension fund for the sharing of his pension interest. The balance of the court's order is not relevant for present purposes.

[3.2] On 01 July 2013 the respondent launched an application in the Vereeniging Civil Regional Court for the appointment of a Receiver and Liquidator in order to give effect to the divorce order for the division of the joint estate. At that stage, the only asset of relevance to the application was the parties' former matrimonial home, described as 11 Umtata Street, Three Rivers, Vereeniging.

[3.3] The appellant opposed the application on the basis that it was not necessary to appoint a Receiver and Liquidator as the parties had finalised the division of their joint estate in 2009 already with the assistance of their attorneys.

[3.4] The learned magistrate, however, suggested in her judgment either that the appellant had failed to establish that there was an agreement concluded between the parties, or that if there was such an agreement, that the court was not bound to give effect to it as it had not been endorsed by the court. The magistrate, accordingly, granted an order in favour of the respondent in terms of which she appointed an attorney, Mr Hendrik Jacobus Roelofse, as Receiver and Liquidator of the parties' joint estate.

[4] It is against this order that the appellant now appeals.

[5] I would like to make the following preliminary observations in the matter which may set the scene for what is to follow:

[5.1] The cases of the former Central Divorce Court seem to have been absorbed by the civil regional courts of Gauteng and the North West Province, which have, in many respects, replaced the former Central Divorce Court. There was no jurisdictional or procedural challenge before us in this regard, and the matter will be addressed on the assumption that this was procedurally legally correct.

[5.2] There was no record of the proceedings in the court a quo that accompanied this appeal. We were informed that this is because the application had been heard and finalised by the learned magistrate in chambers. Courts ought to strive to hear motion

matters in open court with a proper recording of the proceedings. If, for good reason, the matter had to be heard in chambers, the court was still obliged to ensure that a proper record of the proceedings was maintained, even by short-hand, if necessary. See Rule 30 of the Magistrates Court Rules generally.

[5.3] Both, the respondent's founding papers, and the appellant's answering papers in the court below were rather poorly compiled. The founding papers lack salient facts in relation to the merits of the application. All that the respondent states as motivation for the order is the following:

'*I am being prejudiced if the joint estate is* (sic) *not divided and I be given my share.*'

[5.4] This is hardly compelling. A court needs to properly assess whether the joint estate ought to be burdened with the appointment of a Receiver and Liquidator. Besides the fact that one has to virtually interpret the founding papers in order to conclude that the respondent was actually alleging that the joint estate had not yet been divided in accordance with the court order, the relevant facts relating to the four-year delay in seeking the order were not addressed, and neither were there any facts presented about what had transpired between the parties in that time in relation to this issue. At face value, it was improbable that after the divorce in August 2009, that absolutely nothing had occurred in relation to this matter for the next four years. Courts need to

be alive to what parties sometimes do not disclose to the court, and appropriate inferences ought to be drawn when necessary.

[5.5] The appellant's answering papers in opposition to the application were not much better either, and crucial annexures to the papers were negligently omitted to be attached.

[5.6] The agreement that the appellant relies upon, namely an oral agreement that he would retain sole ownership of the immovable property, was quite inadequately expressed. It is difficult to discern the precise terms and conditions of the agreement that he relies upon, especially as this was immovable property that could not simply be transferred or an endorsement made on its title deed merely on the strength of an oral agreement.

[5.7] This was a motion matter, in terms of which there are generally three sets of papers placed before the court, namely the founding, answering, and replying papers. Although the replying papers are optional, negative inferences are often drawn by their absence if an allegation in the answering papers ought to have been replied to. The mere two sets of papers that were before the court were poor enough by themselves, and it would certainly have assisted the court to know what the respondent had to say about the appellant's alleged agreement about the immovable property. Yet no replying papers were delivered.

[5.8] A judicial officer ought to, generally, strive to ensure that he/she has as complete a set of papers before him/her as possible in order to properly understand the case over which he/she is required to render a decision. An incomplete set of papers prevents a

judicial officer from fully appreciating the real issues between the parties, with the result that the decision that is ultimately rendered is more likely to be an incorrect decision.

[6] In this case the learned magistrate had refused the appellant the opportunity of

rectifying the shortcomings in his answering papers in relation to the omitted annexures. Although negligent, the appellant's attorneys were, clearly, not acting in bad faith. These were crucial documents in relation to the appellant's defence to the application in that they apparently established the existence of the agreement that the appellant relied upon.

[7] There was no apparent urgency in the matter. A simple postponement, with leave to the appellant to supplement his papers would have sufficed. It was the type of situation that could adequately be taken care of with an appropriate costs order, and if necessary, a costs order against the responsible attorney de bonis propriis, if such an order was requested by the respondent. Courts must be firm, but not unreasonable. The learned magistrate did not exercise her discretion properly when she refused to allow the appellant's attorney the opportunity of correcting his error.

[8] If I understand the learned magistrate's reasons for judgment correctly, however, it seems that even if the documents had been attached, she may still not have been persuaded by them, as she states the following, verbatim, in her written judgment:

> '*The said written Consent Paper was not submitted to Court and the Court was not privy to the terms of the parties Settlement Agreement. Above all the Court did not incorporate the Written Deed of Settlement on to the Divorce Decree. <u>If the Consent Paper has been not made an order of court, it is not feasible to enforce it</u>. It is then*

only binding inter-partes. The court cannot be called upon to enforce it.'

[9] I cannot agree with the learned magistrate's assessment.

[10] The appellant contends that in pursuance of the divorce order of 24 August 2009 that the parties divide the joint estate, they did so during or about 05 October 2009 through negotiations between their respective attorneys. If, indeed, this had occurred then the parties are bound by their agreement, and it amounts to a complete defence by the appellant.

[11] The parties' agreement need not necessarily be incorporated into the divorce order, although, in respect of immovable property, it may have been prudent to do so, and it may be necessary to compile a proper written agreement for the purposes of effecting an appropriate transfer of the property or endorsement on the title deed. However, even in the absence of a written agreement or a court order, the parties' oral agreement as to the terms of the division of their joint estate would be mutually binding upon them.

[12] The learned magistrate correctly appreciated that the parties would be bound by their agreement. However, she was not correct in concluding that the court cannot be called upon to enforce it. The court would be bound to enforce the agreement in the sense of upholding the appellant's point that the parties had already divided the joint estate, and thereby dismissing the respondent's application for the appointment of a Receiver and Liquidator.

[13] The only question, then, is whether it was reasonably clearly established in the papers that the parties had, indeed, concluded an agreement with each other in terms of which the joint estate had been divided. This is simply a question of fact, and the onus of establishing same would have been on the appellant on a balance of probabilities.

[14] On the assumption that the two letters that the appellant had omitted to attach to his answering papers are to be taken into account, the key facts in his papers would then have been the following parts of those letters that were exchanged between the parties' respective attorneys.

[15] First, the appellant's attorney's letter dated 02 October 2009, addressed to the respondent's attorneys, addresses various aspects of the divorce that had recently been finalised, and concludes with the following in relation to the division of the estate:

> '*Ons plaas verder op rekord dat u klient afstand doen van haar aanspraak op die helfte van die vaste eiendom. Ons klient sal hierdie eiendom op sy naam oordra sodra hy in staat is om met die Bank 'n reeling te tref da thy alleen aanspreeklik is vir die verband. Intussen sal hy maandeliks die paaimente betaal*.'

[16] Second, in response, the respondent's attorney's letter dated 05 October 2009, in relation to the division of the estate reads as follows:

> '*Skrywer het gelet op die inhoud van u skrywe en is dit ons instruksie om as volg daarop te antwoord:*
>
> *Onroerende eiendom:*
> *Dit is inderdaad ons instruksie da tons klient nie belangstel of enige aanspraak wil maak op 'n 50% aanspraak op die onroerendeeiendom ooreenkomstig die partye se gewese Huweliksgoederebedeling nie.'*

Roerende eiendom:
Dit is verder skrywer se instruksie dat ons klient geen aanspraak wil maak op enige roerende eiendom tans in u klient se besit nie aangesien ons klient 'n skoon blad wil begin met haar nuwe huwelik en vertrou ons u klient sal dit so verstaan.'

[17] At face value, it appears that the parties had, indeed, agreed on the terms of the division of their estate. It is, however, not entirely clear whether these were the full terms and conditions of their agreement. The appellant seems to suggest in his answering affidavit in the court below that he was to retain the immovable property as the respondent had received a share of his pension interest. Although his suggestion is not consistent with the terms of the divorce order, as the respondent was entitled to share in his pension interest in any event, the respondent would have been entitled to contract to her detriment in relation to the balance of the assets, as appears to have been the case. The finer details of the division of the estate, however, appear not to have been fully addressed by the attorneys in their letters.

[18] The four-year delay in the matter also creates an element of uncertainty whether the parties' initial agreement was subsequently varied in any way. The sparsely-drafted affidavits of the parties add to the uncertainty. Either, the respondent is now being opportunistic in seeking a share of the immovable property, or the parties' apparent agreement of 05 October 2009 was subsequently varied.

[19] On the papers before the court, the learned magistrate would have had to assess whether the respondent had proven her entitlement to an order for the appointment of a Receiver and Liquidator, whether the appellant had discharged his burden in establishing that the estate was already divided, or whether there was a dispute of fact

on the papers that she was unable to resolve on the papers themselves. If it was the latter, she could have considered hearing oral evidence in accordance with the approach set out in the case of *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 AD. In any event, it would be appropriate, in my view, if this matter were to be

remitted to the magistrate to be heard in the manner that it originally ought to have been.

[20] In the circumstances, I make the following order:

1. The respondent's application for the condonation of the late filing of her Heads of Argument is granted;
2. The respondent is to pay the costs of the condonation application;
3. The appeal is upheld;
4. The magistrate's order in the court a quo is set aside;
5. The appellant and respondent are granted leave to supplement their answering and founding papers respectively as they deem necessary, and the respondent is granted leave to file a replying affidavit if she deems it necessary;
6. The respondent is to deliver her supplementary founding affidavit, if any, by 16:00 on 20 November 2015, whereafter the dies for the exchange of further papers will be regulated by the Magistrates Court Rules;
7. Any extension of time that the parties require in relation to this order may be sought in terms of Rule 60(5) of the Magistrate's Court Rules;
8. The matter is remitted to the magistrate to be heard afresh;
9. Costs of this appeal will be costs in the application to be heard afresh.

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A CHAITRAM
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

I agree.

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G WRIGHT
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION

Appearances:

On behalf of the Appellant: Adv. Wijnbeek
On behalf of the Respondents: Adv. Prinsloo

Date Heard: 19 October 2015
Date Judgment Delivered: 21 October 2015