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

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

17/11/2017
DATE

SIGNATURE

CASE NO: 57219/2014

In the matter between:

GREGORY RAMATHE PHILEMON PADI Applicant

and

PHILIP JORDAN N.O. Respondent

JUDGMENT

MIA, AJ

[1] The applicant seeks rescission of a judgment by default granted against him in favour of the respondent on 1 March 2016. The applicant bases his application on Rule 42(1) (a) and challenges the respondent's *locus standi* and that the summons failed to disclose a cause of action. The application is opposed.

[2] The applicant, a medical practitioner, was the defendant in a divorce action instituted by his former wife. The respondent was appointed as

the liquidator of the joint estate in terms of a settlement agreement which was made an order of court. The respondent was given certain powers set out in an annexure attached to the settlement agreement. The liquidator was to realise the whole of the joint estate's assets, moveable and immoveable. Further he was specifically directed to investigate whether the sale of certain property by the applicant was contrary to the provisions of section 15 of the Matrimonial Property Act, Act 88 of 1984 when effecting a division of the joint estate and whether it caused a loss to the joint estate.

[3] After the liquidator completed his investigations and the Liquidation and Allocation account was finalised it was provided to the parties. In terms of the Liquidation and Allocation Account the applicant was required to pay his erstwhile spouse R541 040.55. The Liquidation and Allocation Account was sent to both parties with a notice that they had fourteen days to lodge a dispute or objection. The applicant did not lodge a formal dispute within fourteen days with the liquidator. He did not however agree with the liquidator regarding the manner in which assets were dealt with. The applicant was of the view that all assets which formed part of his medical practice as a separate incorporated entity did not fall within the joint estate by operation of law and the liquidator included same in the liquidation and allocation account incorrectly.

[4] When no dispute was lodged and the amount due to the spouse was not paid the liquidator issued a summons for payment of the amount of R584 218.45 for the applicant's liability arising from the winding up of the joint estate following the divorce. The applicant defended the action and filed a plea wherein he disputed the correctness of the Final Report Liquidation and Allocation Account. The applicant questioned whether:

1. the respondent had the authority to bring legal proceedings against the applicant in terms of the mandate.

2. whether the respondent exceeded his powers in launching legal proceedings without seeking leave of the Court first;

3. whether the respondent has not exceeded the limited power set out in the settlement agreement dated 17 November 2011 which mandated him to

> "investigate and ascertain as to whether or not the sale of the immoveable property situated at Erf 1201, Sagewood Ext 10, Reg Div JR Province, Gauteng was sold by the Defendant and /or the company known as GRP Padi contrary to the provisions of Section 15 of the Matrimonial Property Act, Act 88 of 1984 and if so, the said liquidator is authorised to make the necessary adjustments in terms of the provisions of section 15 of the Matrimonial Property Act, Act 1984 in favour of the Plaintiff when effecting a division of the joint estate as provided for above."

4. Whether the respondent is empowered in terms of the settlement agreement providing for his appointment on the limited terms set out therein, or under the general laws of the Republic of South Africa, to incorporate in a joint estate of persons married in community of property, properties previously held in an Incorporated legal entity registered under the Company Laws of the Republic of South Africa and having a distinct and separate legal persona from the spouses as individuals.

[5] The applicant avers that the specific mandate which was given to the liquidator namely the valuation of the Sagewood property was not fulfilled namely to determine whether it was sold in contravention of the Matrimonial Property Act as this is not evident from the final report. The liquidator did not show that the joint estate suffered a loss vis a vis the sale of the Sagewood property. In view hereof an adjustment could not be effected in favour of his ex-spouse in the joint estate if the joint

estate did not suffer a loss as a result of the sale of the Sagewood property. The applicant further raises in a supplementary affidavit filed late, that he was requested to abandon his half share of his wife's pension in which event he would be required to pay her only R268 734. 28 instead of R541 040.55.

[6] The respondent objected to the filing of the supplementary affidavit and raised the point that the applicant was dilatory in filing the supplementary affidavit. The applicants supplementary application was accompanied by a request for condonation. I have sought to give the applicant the benefit of considering all aspects that may impact on the final decision herein and permitted the supplementary affidavit. The defence did not seek an opportunity to file an affidavit in response. The applicant sought to introduce new material by suggesting that there was a lesser amount due according to the liquidator's earlier communication and invited the respondent to deliver an affidavit in response. This offer was not taken up by the respondent understandably so, as this seeks to effectively at this late stage challenges the Liquidation and Allocation Account which the applicant did not object to initially. The respondent contended that the applicant who was legally represented at the time, refused to co-operate with the liquidator. He was of the view that a meeting was not necessary and when financial information was requested his accountants failed to furnish sufficient information. The Liquidation and Allocation Account dealt with all assets, liabilities and the three properties including the Sagewood property and accounts in terms of the mandate required.

[7] The applicant is required to show that there is an absence of wilfulness (*Morkel v ABSA Bank Bpk en Ander* 1996 (1) SA 899 (C) at 903) and that he has a reasonable explanation for his default. Our Courts have not tolerated wilful default but have taken a more tolerant approach to gross negligence. (*Kouligas & Spanoudis Prop (Pty) Ltd v Boland*

Bank Bpk 1978 (2) SA 414 (O)). *In casu*, the applicant was aware of the court date and that the matter was proceeding to trial. Thus he must show that there was a reasonable explanation for his default. It appears the applicant elected not to co-operate from the outset when things did no go his way. He chose not to meet with the liquidator whilst his ex- spouse did. He was aware that the matter was enrolled. He entered a plea in the matter. He was legally represented and engaged with the liquidator through his legal representative. He then chose not to come to court due to lack of funds for legal services. He was employed at the time. There is no explanation for his failure to attend in person or to appoint alternative legal representatives or legal aid. The applicant has not taken the court into his confidence in this regard completely.

[8] The applicant must show that the application is made bona fide and not with the intention to delay the plaintiff's claim. The respondent referred to the decision in *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411 at 417 where Van Reenen J expressed the view that:

> "In terms of the common law, a court has discretion to grant rescission of judgment where sufficient or good cause has been shown. But it is clear that in principle and in the long- standing practice of our Courts, two essential elements of "sufficient cause" for rescission of a judgment by default are: that the party seeking relief must present a reasonable and acceptable explanation for his/her default that on the merits such party has a bona fide defence, which prima facie, carries some prospect of success".

[9] The above view is reiterated in *Chetty v Law Society of Transvaal* 1985 (2) SA 765 A at 765 where court stated that

> "it is not sufficient if only one of these elements is established. The applicant must establish that he has a bona fide defence to the claim which prima facie carries some prospect of success."

The applicant has not taken this Court into his confidence with regard to his financial position regarding his own position and that regarding the medical practice. He makes a general statement that certain items ought not to have been taken into account. Without the benefit of his full disclosure in this regard it is not possible to ascertain the veracity of his claim against the liquidator's investigations.

[11] There is no authority placed before this Court on which the applicant relies to support the submission that the respondent has no *locus standi* to realise the estate and in doing so to sue the applicant to divide and distribute the estate and fulfil his mandate. The respondent relies on the decision in *Van Tonder v Davis* 1975 (3) SA 616 (C) at 618 C-D where Court said:

> "Upon termination and in the absence of agreement, a receiver should in the ordinary course and in the absence of agreement as to how the dissolution of the partnership is to be achieved, be appointed to collect all assets, discharge all debts and generally liquidate the partnership. Assets in the possession of either party must be surrendered to the receiver. Indeed, once a receiver is appointed, he is the only one with the *locus standi* to claim delivery of the partnership assets."

[12] The liquidator acted with the necessary *locus standi* having established what percentage or portion of the joint estate needed to be apportioned between the parties. There was no action based on his requests. He was required thus to realise the estate to proceed in terms of his mandate.

[13] The applicant's defence based on the respondents' lack of *locus standi* Is not sustainable and therefore does not amount to a *bona fide* defence for purposes of this application for rescission. He has also failed to show an absence of wilfulness as he was aware of the date of

the trial. This means that, in my judgment, the prerequisites for the granting of a rescission are not present and the applicant has therefore not shown 'good cause'.

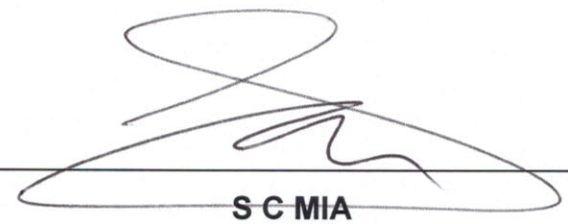
[14] Although costs were requested on the attorney client scale in the written heads of argument, Mr Basson conceded that costs on the normal scale should follow.

ORDER

[15] In the result I make the following order:

1. The application for rescission is dismissed.

2. The applicant shall pay the respondent's costs of this application.



S C MIA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

On behalf of the applicant	:	Adv G Steyn
Instructed by	:	Mageza Raffee Moekoena Incorporated
On behalf of the respondent	:	Adv A Basson
Instructed by	:	Frankim Attorneys
Date of hearing	:	31 October 2017
Date of judgment	:	___ November 2017

Appearances:

On behalf of the applicant	:	Adv G Steyn
Instructed by	:	Mageza Raffee Moekoena Incorporated
On behalf of the respondent	:	Adv A Basson
Instructed by	:	Frankim Attorneys
Date of hearing	:	31 October 2017
Date of judgment	:	17 November 2017