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

CASE NO: 25091/12

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED: NO
Date: …11 June 2021…

In the matter between:

ALBERTS, WENDY-ANN Applicant

and

CAPELL, PAULA JOANNE First Respondent
DAVID NAGLE Second Respondent

JUDGMENT

TURNER AJ:

[1] The applicant and the first respondent were involved in a romantic relationship up until approximately 2011/2012. During their relationship they had acquired movable and immovable property together. After the breakup, during July 2012, the applicant instituted action proceedings to terminate their co-ownership of two properties, namely, Erf [....] Maroeladal Extension 23 Township ("the Waterford property") and Portion 5 of

Erf [....] Norscot Township ("the Penguin property") and for an order that a Receiver be appointed to dispose of the properties and prepare a final account.

[2] Shortly before the trial in November 2013, the parties agreed to terms which were then made an Order of Court by the Honourable Deputy Judge President on 25 November 2013 (the "2013 Order"). I will return to the terms of the 2013 Order below but note for current purposes that: the 2013 Order does not record whether the action proceedings were settled or postponed by the 2013 Order; the applicant refers to this as a "settlement agreement" and the respondent denies it was a "settlement agreement"; the 2013 Order confirmed the appointment of Mr David Nagle as a referee with various powers to resolve the dispute between the parties; the parties never returned to pursue the relief or disputes in the initial action after the 2013 Order.

[3] Approximately 2 ½ years after the 2013 Order was granted, Mr Nagle delivered his
"Final Report in connection with the Net Equity Value of and the Parties Contributions Towards the Fixed Properties and Movable Assets and Resulting Settlement Amount Payable" dated 12 February 2016. In his report, Mr Nagle confirms that he had previously issued two draft reports for comment by the parties and that this (12 February 2016) report represented his "Final Report in the matter". Mr Nagle was cited as the second respondent but he played no role in the proceedings.

[4] In his report, Mr Nagle identified the information he had received, the calculations he had done and made various findings, including the following:

4.1 in relation to the Valuation date

> *As the Defendant has not received any payment to-date and the Agreement of Settlement provides no mechanism for the payment of interest, on a fairness perspective I consider it reasonable that a current*

date valuation should be utilised. (I emphasise again that this is not a legal view but based purely on what I perceive as fair.)

6.3. Utilising a current date valuation presents practical challenges because it presents a continuously moving target. I have therefore set the valuation date as being 30 September 2015 ("the Valuation Date").

4.2 in relation to the valuation of the Penguin property:

6.1.1 I have commissioned Mr Brian Bolton. a certified property appraiser, to carry out a market valuation of Penguin Drive. A copy of Mr Bolton's report is attached as Annexure "D". I have placed reliance on Mr Bolton's determination.

6.1.2 Mr Bolton has determined that the market valuation of Penguin Drive is R4 500 000 (four million five hundred thousand Rand).

6.1.3. The Defendant has queried the accuracy of Mr Bolton's assessment of the value of Penguin Drive as being too low. The Plaintiff indicated to me that she thought it was too high. While I am not an expert in property valuations, I have discussed Mr Bolton's report with him and I have no reason to doubt his approach or outcome. Mr Bolton has advised that he has valued the property based on its zoning. which is Residential 1 .

6.1.4 It is clear to me that the issue of the Penguin Drive valuation is a major stumbling block in the Parties reaching final agreement. In an endeavor to bring the matter to finality, I requested the Plaintiff to afford access to Penguin Drive for an altemative valuation by a second valuator, which could then be benchmarked against Mr Bolton's valuation. Despite numerous requests which delayed the issuing of this final report, the Plaintiff has refused to allow access to the property for this purpose, citing her views on the Valuation Date together with the costs involved as the reasons therefore.

6.1.5. This report is therefore made subject to a possible second valuation at Penguin Drive.

4.3 In conclusion, on the net liability of the applicant to the respondent:

11.1 On the basis that the Plaintiff retains as her sole and exclusive property the property situated at Erf [....] Norscott Township (Penguin Drive) and the Defendant retains as her sole and exclusive property the property situated at Erf [....] Maroeladal Township (Waterford), the net amount to be paid by the Plaintiff to the Defendant is R870 892 (eight hundred and seventy thousand eight hundred and ninety two Rand) in order to ensure that each party is allocated 50% of the net equity market value of the properties after taking into account of, and making an adjustment for, the income received and the reasonable and necessary costs paid by the Parties towards the acquisition, maintenance, renovation, improvement and running of the properties. Such amount is subject to possible adjustment for the valuation date and the market value of Penguin Drive as more fully detailed in this report.

11.2 If the Parties are able to reach agreement as to who will retain the boat, the party keeping the boat should pay R32 500 to the other party. If the parties are unable to reach agreement, I suggest that the boat should be sold.

[5] The parties did not implement the findings of Mr Nagle's report. It seems that the respondent was unhappy with the valuation of the Penguin property, sought to obtain another valuation. She obtained an order from this Court in November 2017 to allow her preferred valuer to get access to conduct a valuation. In February 2018, the applicant launched the current application in which she seeks an order that Mr Nagle'sreport be referred back to him in order for him to amend it and recalculate the amounts based on a dissolution of the partnership to be the date of the Court Order 25 November 2013.

[6] The respondent delivered an answering affidavit resisting this application and challenged various aspects thereof. The primary issue addressed by the respondent is the valuation of the Penguin property. The respondent contends that the valuation carried out by the valuer appointed by Mr Nagle (Mr Bolton) had rendered an unacceptably low price, that she had appointed an alternate valuator and, after being obstructed by the applicant, the replacement valuator (Mr Jacobs) valued the Penguin property in 2018 at R5,600,000, some R1,1 million higher than the valuation of R4,500,000 prepared by Mr Bolton and relied upon by Mr Nagle. The result, according to the respondent, was that the second valuation should be used to determine the price of the Penguin property, increasing the payment amount due to her.

[7] Nothing happened in the main application for almost two years after the answering affidavit was delivered in October 2018. Following this delay, the first respondent launched a counter application in August 2020 in which she sought a declarator that the partnership between the applicant and the first respondent "is dissolved with effect from 12 February 2016" - being the date of Mr Nagle's report and the date she contended for in her answering affidavit. The respondent also seeks: declaratory relief in relation to the valuation of the Penguin property; an order that the applicant make payment to her in the amount of R1,453,939.00 (calculated using Mr Jacobs' valuation); an order to effect the transfer of the undivided shares held by the applicant in the Waterford property to the respondent; and an order to effect transfer of the undivided share in the Penguin property by the respondent to the applicant. The respondent also claimed payment of the costs which she had incurred in appointing Mr Jacobs, to carry out the second valuation on the Penguin property.

[8] The counter application spurred the applicant back into action. The applicant delivered a short replying affidavit in the main application and a short answering affidavit in the counter application in October 2020 denying the respondent's entitlement to the relief claimed and asserting that the relief claimed in her application should be granted. The respondent's replying affidavit in the counter application was delivered in November 2020.

[9] I note that both parties express a desire to have the matter resolved expeditiously. However, each party appears to have dug-in on her own position and been unwilling to move on the remaining disputes. Neither party has made use of Uniform Rule 41A in an attempt to resolve the dispute through mediation, an issue that is relevant to the award of costs.

[10] In the view that I have taken of the matter, the parties have both erred in failing to read the original Order dated 23 November 2013 which has led to a litany of unnecessary litigation since the delivery of Mr Nagle's report. For that reason, I start with the terms of the 2013 Order.

The November 2013 Court Order

[11] I quote extensively from the 2013 Order below:

> … The Plaintiff and the Defendant are co-owners of two immovable properties situated at Erf [....] Maroeladal Extension 23 Township and Portion 5 and JO of Erf [....] Norscot Township ("the properties ") and the items listed in annexure A attached hereto ("the goods").
>
> 1. The parties hereby appoint and engage Mr David Nagle, as referee in terms of Section 19bis of the Supreme Court Act, in order to:
> 1.1 Establish the market value of the properties.
> 1.2 Establish the net equity market value of the properties after deduction of any amounts owing in respect of mortgage bonds registered over the aforesaid immovable properties.
> 1. 3 Established a marked (sic) value of the goods.
> 1.4 Established the whereabouts and current status of the goodr.

1. 5 Calculate and establish the full and precise extent of income generated, in any manner whatsoever, by and/or in connection with, the properties, including, but not limited to, rentals.

1.6 Calculate and establish the full and precise reasonable and necessary costs expended by either of the parties in connection with the acquisition, maintenance, repair, improvement and renovation of the properties.

1.7 Determine what costs expended by either of the parties as aforesaid are reasonable and/or necessary . .

1.8 Calculate and establish, on the basis that the Plaintiff retains as her sole and exclusive property the property situated at Erf [....] Norscot Township and the Defendant retains, as her sole and exclusive property, the property situated at Erf [....] Maroeladal Extension 23 Township, Portions 5 and JO, what amount is to be paid by the Plaintiff to the Defendant to ensure that each party is allocated 50% of the net equity market value of the properties after taking into account of, and making an adjustment for, the reasonable and necessary costs paid by the parties towards the acquisition, maintenance, renovation, improvement and running of the properties.

1.9 Determine an equitable split of the movable goods either on the basis of the division of the actual goods alternatively by way of an allocation of certain of the goods to one party and the remaining goods to the other party with a pecuniary adjustment being made in terms whereof one party would be required to make payment to the other party of an amount so as to ensure that each party is allocated and receives 50% of the value of the goods.

1.10 Prepare such accounts as may be necessary reflecting the above.

2. The referee is to report to the above Honourable Court as soon as reasonably possible.

3. The referee has the powers as envisaged in section 19(3), (4) and (6) of the Supreme Court Act 59 of 1959 as well as the powers set out hereunder.

4. The parties are entitled to submit to the referee any such evidence, both oral and in the form of documents or written statements, as are relevant in order to facilitate the referee completing his mandate as set out herein.

5. The referee's findings will be final and binding on the parties.

6. In addition to the powers in terms of Section 19bis of the Supreme Court Act 59 of 1959 the referee shall have the following powers: ….

6.1 The right to make all investigations necessary and in particular to obtain from the parties all information with regard to the properties and the goods. ….”

[12] Neither party engaged properly the terms of this Order in presenting its affidavits and making its claims in the current applications. In my view, it is essential to interpret and apply the 2013 Order before diving into the factual disputes and arguments in the current application papers.

[13] Clause 1 sets out clearly the ambit of the work to be done by Mr Nagle. Included in clause 1.8 is the requirement that he calculate and establish, on the basis that the plaintiff retains the Penguin property and the defendant retains the Waterford property: what amount is to be paid by the plaintiff to the defendant to ensure that each party is allocated 50% of the net equity market value of the properties after taking into account and making an adjustment for, the reasonable and necessary costs paid by the parties towards the acquisition, maintenance, renovation, improvement and running of the properties. This necessarily requires the referee’s determination to be done after a review of all of the information he gathers.

[14] Clause 2 of the Order requires the referee to report to the Court and clauses 3 and 6 set out the powers given to the referee. Critically, for purposes of the current

application, clause 5 provided that Mr Nagle's"findings will be final and binding on the parties".

[15] Section 19bis of the Supreme Court Act provided:

> "1. In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer (a) new matter which requires extensive examination of documents … (b) any matter which relates wholly or in part to accounts; or (c) any other matter arising in such proceedings,
> for enquiry and report to a referee, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.
>
> Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question."

[I note that the parties refer to section 19bis of the Supreme Court Act, 1959 in the Order, but by November 2013, the 1959 Act had been repealed and section 38 of the Superior Courts Act 2013 applied.]

[16] Subsections (2) - (5) deal with the powers of the referee to summon witnesses and procure evidence.

[17] If the provisions of Section 19bis had been adopted, without more, there may have been an argument that the Court's adoption of the report was required before it was effective. However, in this case, the parties and the Court modified the ordinary position in clause 5, recording that the referee's findings would be final and binding on the parties.

[18] The Supreme Court of Appeal has confirmed the role played by a referee's report (in the ordinary course) and the test to be applied if any party wishes to modify it (*Wright v Wright & Another* 2015 (1) SA 262 (SCA)). With reference to section 19bis of the Supreme Court Act, 1959 and section 38 of the Superior Courts Act, the SCA confirmed (at para 8) that "*a court is bound by the findings of a referee contemplated in s 19 bis, unless it can be found that the conclusions arrived at by the referee were unreasonable, irregular or wrong.*" The SCA found that the position was similar to that of an expert valuator and highlighted the importance of recognising and upholding the finding of an appointed referee or expert valuator, in the absence of a gross irregularity or mistake. The role of an expert valuator tasked with producing a final and binding report has been discussed previously by the SCA (*SA Breweries Ltd v Shoprite Holdings Ltd* 2008 (1) SA 203 (SCA)). It seems to me that the approach adopted by the parties (and the Court) in the 2013 Order, was to appoint Mr Nagle with the evidence gathering powers of a referee and to confirm the status of his report and findings as being "final and binding", akin to those of an expert called on to make a determination.

[19] As such, it is clear that the 2013 Order did record the terms on which the parties settled the 2012 action proceedings and bound the parties to a set of rules for the resolution of their disputes over the value to be paid by one to the other on the termination of their co-ownership of the property covered by the 2013 Order.

[20] An assessment of Mr Nagle's report dated 12 February 2016 indicates that heunderstood his mandate and complied with each of his obligations in terms of clause 1 of the November 2013 Order. He undertook a detailed analysis of all of the available records and exercised his judgment, as referee, in relation to those aspects where there was a dispute between the parties. These disputes appear to have included matters relating to the validity of supporting documentation, the validity of representations made by the applicant or the respondent, and he applied a consistent approach to different topics across the different properties.

[21] Having regard to the nature of the expert determination which the parties agreed would be “final and binding”, it seems to me that Mr Nagle performed precisely the mandate that the parties required him to perform and he arrived at a result which was considered and equitable. The fact that both parties are unhappy with the result may well be the proof of Mr Nagle’s objectivity.

[22] In my view, when the parties received Mr Nagle’s report in February 2016, they ought to have accepted and implemented his findings. Having done so, the dispute between them would have been finally resolved. The current proceedings reveal that the parties did not recognise the “final and binding” status of Mr Nagel’s report. I now deal with each of the aspects raised and assess whether any of them meet the threshold necessary to justify a modification of Mr Nagle’s report.

The relevant valuation date

[23] The applicant contends that Mr Nagle’s use of 30 September 2015 was arbitrary and that he ought to have used a valuation date of 23 November 2013, being indicative of the date on which the partnership dissolved. The applicant relies on common law rules regarding the dissolution of partnerships for these submissions. However, even if the partnership dissolution date were relevant, which it is not for the reasons below, the applicant’s preferred date is equally arbitrary as it is clear the romantic partnership dissolved prior to the trial action being instituted in July 2012. By contrast, the respondent asserts that the date of Mr Nagle’s final report (12 February 2016) should be used as the date of the dissolution. No extrinsic evidence is provided to support this assertion and, to the extent that the date has been chosen to coincide with Mr Nagle’s report, I am not sure how the respondent thinks Mr Nagle could have assimilated all of the information up to 12 February and produced his report on the same day. As he stated in his report, it would have been a constantly moving target.

[24] It seems to me that the parties have embarked on the wrong inquiry and invoked the wrong principles in attempting to change the valuation date. Once they agreed and the Court issued the 2013 Order, it was the provisions of that Order which bound the

termination and valuation of their co-ownership in the properties, not the common law of partnership or the parties' preferences. The parties gave Mr Nagle the power to determine the amount payable by the one to the other having regard to the valuationswhich he placed on the goods and properties. Given that the parties would continue to co-own both the Penguin and Waterford properties throughout the period, it was unnecessary for Mr Nagle to back-date (or future date) his valuations. What he needed to ensure was that the approach adopted was in accordance with the agreed Order. In my view, he complied with his mandate and his choice of 30 September 2015 as a valuation date cannot be criticised.

[25] As an aside, I agree with the submissions of the first respondent that, if the parties had sold either or both of the properties following the 2013 Order, the value realised by each from the sale of the properties would be half of the value realised in the sale. It would have been artificial and inconsistent with the terms of the Order for the parties to have determined a market value at a prior date when the true market value of the properties was realised through a sale transaction during the valuation process. Similar reasoning can be adopted to justify Mr Nagle's use of a date after November 2013.

The 2018 Jacobs valuation

[26] The respondent insists that the court should replace the valuation undertaken by Mr Bolton during 2015 (on the instructions of Mr Nagle) with the valuation undertaken by Mr Jacobs in 2018. In doing so, she asserts that Mr Nagle's report anticipates the delivery of a new valuation, that the new valuation would have influenced his findings and that the sole reason for the delay in obtaining the Jacobs report was the obstructive conduct of the applicant.

[27] Even if this were so, the respondent does not provide any justification for disregarding the valuation undertaken by Mr Bolton or for disregarding the views

expressed by Mr Nagle in respect of Mr Bolton's report at paragraph 6.1.3 of Mr Nagle's report.

[28] In regard to the valuation report by Mr Jacobs, that report cannot be taken by the Court and merely substituted for the report of Mr Bolton, leaving the remainder of Mr Nagle's report unchanged, for at least the following reasons:

28.1 The founding affidavit in the counter application does not disclose Mr Jacobs'expertise that qualifies him as an expert. The applicant has rightly objected to the introduction of those credentials in the replying affidavit, as a party cannot make its case in reply. (*Esau And Others v Minister Of Co-Operative Governance And Traditional Affairs And Others* 2021 (3) SA 593 (SCA) para 60)

28.2 Mr Jacobs' valuation was conducted in 2018 and no attempt was made toreconcile that 2018 valuation to Mr Nagle's valuation date of 30 September 2015.

28.3 No evidence is available to indicate whether renovations, changes etc were made to the property between 2015 and 2018 and no account has been taken of additional capital or maintenance costs that may have been incurred on the Penguin property between 2015 and 2018.

28.4 No attempt has been made to assess how the use of Mr Jacobs' valuation would necessitate the adjustment of any other amounts taken into account in Mr Nagle's report.

[29] In the circumstances, even if the Mr Jacobs' valuation were correct as at 2018, it is not useful evidence for determining the value of the property or an equitable split between the parties at the valuation date of 30 September 2015. Further, and in any event, there is no warrant for substituting a 2018 report for the 2015 report of Mr Bolton

where there has been no attack on the independence, expertise or credibility of Mr Bolton and there is no evidence that Mr Bolton's report or Mr Nagle's reliance thereon was irregular, unreasonable or wrong.

[30] Given my decision in relation to the usefulness of Mr Jacobs' valuation in these proceedings, the applicant should not be obliged to contribute to the costs of procuring that report.

The transfer of the properties

[31] There is no opposition from the applicant to the relief claimed by the respondent in relation to the transfer of the properties. It seems that both parties believe it is time for the properties to be transferred and to be registered in their own names. It seems appropriate that the transfers should be effected at the same time. I agree with Mr Nagle (Report paragraph 9) that, as the costs are incurred for purposes of splitting the estate, the costs of both transfers should be shared equally between the parties.

[32] During argument, I urged the parties to agree on a single conveyancer to conduct both transfers so that the transfers could take place at the same time and the split of the costs associated therewith can be managed centrally. After conclusion of the hearing, the parties reverted to me and confirmed that Ms. Louw-Mari Nell of Ayoob Kaka Attorneys has been agreed as the conveyancer to be appointed. To that end, the parties are requested to provide a copy of this judgment to the conveyancer so that the conveyancer is aware of the requirements in relation to transfer, the timing of transfer and the costs of transfer.

[33] The quantum of the amount payable by the applicant to the respondent is determined with reference to Mr Nagle's report and the counter-application. The amount payable is R903, 392.00 calculated as follows: R870,892.00 after the reconciliation in respect of the immovable properties; plus R32,500 in respect of the boat. (I note that, in

her answering affidavit to the counter-application, the applicant does not challenge the claim in respect of the boat.)

[34] In relation to interest, counsel for both parties confirmed that the date on which interest begins to run is 12 February 2016 and the prescribed rate to be applied, on a straight-line basis, is 8,75%.

[35] In relation to costs, neither party has been successful in obtaining the main relief they sought and, in my view, both parties ought to have given more weight to the findings in Mr Nagle's report. Further, there is no evidence that either party invoked Uniform Rule 41A to refer the matter to mediation and so I consider that each party should bear her own costs.

[36] **In the circumstances, I make the following Order:**

(1) The applicant's application is dismissed.
(2) The findings in Mr Nagle's report, dated 12 February 2016, including his determination of the valuation date, are final and binding.
(3) The applicant is liable to make payment to the first respondent in the amount of R903 392.00 within 60 days of this order.
(4) The applicant is to pay interest on the above amount at the rate of 8,75% calculated from 12 February 2016 to date of payment.
(5) The parties shall arrange for the simultaneous transfer of their undivided shares in the immovable properties as follows -
a. The applicant shall transfer her undivided share of the immovable property known as the Waterford property - Erf [....], Maroeladal Extension 23 Township, Registration IQ Province of Gauteng, measuring 764 (seven hundred and sixty four) square metres held by Deed of Transfer T052539/06 - to the first respondent;
b. The first respondent shall transfer her undivided share of the immovable property known as the Penguin property - Portion 5 of Erf [....] Norscot Township Registration

Division IQ Province of Gauteng measuring 2111 (two thousand one hundred and eleven) square metres held by Deed of Transfer T65221/2009 - to the applicant.

(6) The applicant is to pay 50% of the total costs of both transfers to the conveyancer.

(7) The first respondent is to pay 50% of the total costs of both transfers to the conveyancer.

(8) The applicant and first respondent are ordered to do all things necessary and to sign all documentation necessary, within 60 days of this Order, to effect the transfer and registration of the aforesaid properties. In the event of either party failing and/or refusing to sign and execute such documentation within 10 days of being provided with same and requested by the conveyancer to do so, the Sheriff of this Honourable Court is authorised to sign all such documentation necessary to effect the transfer and registration of the properties aforesaid.

(9) Each party is to pay her own costs in respect of the application and the counter-application.

DA Turner AJ

Date of hearing: 8 June 2021
Date of judgment: 11 June 2021

Appearances:

On behalf of the applicant :	Adv R Stevenson
Instructed by:	Clark Attorneys
On behalf of the first respondent :	Adv L Grobler
Instructed by:	Harris Inc