

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

CASE NUMBER: 9804/2021

REPORTABLE: NO
OF INTEREST OF OTHER JUDGES: NO
REVISED
27/10/2012

In the matter of

HLELELENI KATHLEEN MATOLO-DLEPU N.O

APPLICANT

N[....] M[....] (born M[....]2)

RESPONDENT

JUDGMENT

OOSTHUIZEN-SENEKAL CSP AJ:

Introduction

[1] This case concerns the ambit of a Receiver and Liquidators powers where on of the parties refuse to cooperate.

Relevant background facts

[2] Firstly, this is an application to compel the respondent to appear before the Receiver and Liquidator, and to submit to interrogation in order to furnish the true and correct account of all assets of the joint estate.

Secondly, for the respondent to permit or allow the Receiver and Liquidator or any other person acting on behalf of and/or the authority or instructions of the Receiver and Liquidator to access the immovable property of the joint estate for the purposes of taking full inventory and making proper valuation of the concerned property.

Thirdly, in the event that the respondent will fail to comply with the above, that the applicant can proceed with the division of the joint estate without any further consultation and/or involvement of the respondent.

[2] The respondent was married to Mr. J[....] M[....] in community of property during 1973. On 2 November 2015 the marriage relationship was dissolved and the court directed the then Law Society of the Northern Province to appoint a Receiver and Liquidator to deal with the division of the joint matrimonial estate. The respondent is currently occupying an immovable property which is part of the assets of the joint estate, and which is the contentious issue in the matter before me.

[3] On 10 December 2020 **Hlalelani Kathleen Matolo-Dlepu N.O** , the applicant was appointed as Receiver and Liquidator of the joint matrimonial estate.

[4] In order to proceed with her duties as set out in the court order the applicant on 22 January 2021 the applicant requested the respondent to attend a meeting at her offices in order to establish the true and correct account of all assets belonging and forming part of the joint estate. This request was sent to the applicant in writing.

[5] On 09 February 2020, the applicant received correspondence from Lawyers for Black People (NPC) acting on behalf of the respondent stating that the respondent will not attend the requested meeting. After receiving the reply, the applicant responded and advised the legal representative of the respondent to advise the respondent to comply with the court order (divorce) granted on 2 November 2015. The applicant further set out her functions as the Receiver and Liquidator in order to explain her role in the finalization process of the divorce proceedings.

[6] On the 15 February 2021 the applicant received further correspondence from the legal representative of the respondent. The contents of the letter clearly stated that the respondent shall not entertain any further request from the office of the applicant except if it is a court order compelling her to attend a meeting with the applicant.

[7] In paragraph 9 of the letter the following was stated;

“There are no assets Mr M[...] took everything wherefore the house is the only form of dignity and security Mrs M[...] in light of the above averments we shall not entertain further any request from your offices except if it is an application to compel or otherwise.”

[8] On the 16 February 2021 and as a further attempt the applicant addressed a letter to the respondent to appear before her on the 19 February 2021 which request the respondent again refused. Therefore the applicant proceeded with the application.

Submissions by the applicant

[9] The applicant argued that in terms of her main functions as Receiver and Liquidator of the joint estate of the respondent and Mr M[...], the respondent is obliged to attend the meetings with the applicant in her capacity as Receiver and Liquidator in order to finalize the division of the joint matrimonial estate as ordered by court.¹

[10] The main functions of the applicant as Receiver and Liquidator were the following which were set out in the court order dated 2 November 2015;

- i. The evaluation of all the assets (movable and immovable) in the joint estate except personal belongings, including accessing such premises where the assets might be for such evaluation;
- ii. To investigate claims of assets being hidden by either of the parties;
- iii. Establishing the liabilities of the joint estate; and

¹ See the court order JM1 attached to the founding affidavit of the applicant. The Receiver and Liquidator has extensive powers pertaining to the division of the joint matrimonial estate.

- iv. Requesting a factual/accurate inventory or account of either or both of the parties.²

[11] The applicant referred to the case of *Culverwell v Beira*³, wherein, it was held that all orders of court whether correctly or incorrectly granted, must be complied with until they are properly set aside. Therefore the applicant submitted that the respondent should be compelled to attend the scheduled meeting/s with the Receiver and Liquidator in order to furnish the true and correct account of all assets of the joint estate.

[12] The applicant further argued that should the respondent not appear before the applicant, that the court should order the applicant to proceed with the division of the joint estate without any further consultation and/or involvement of the respondent.⁴

Submissions by the respondent

[13] Counsel for the respondent indicated that she intended bringing a counter application in order to vary the order of divorce by DJP Mojapelo, granted on 2 November 2015. The reasons presented for the variation were the following;

- i. The property in question is the primary residence of the respondent and the children born out of the marriage between her and Mr. M[....].
- ii. The respondent is a pensioner and does not have any other source of income.
- iii. The step taken by the applicant is irregular in law.

[14] The respondent conceded that the parties were divorced during November 2015 and due to the fact that they were married in community of property the assets

² See court order paragraph (ii);

"The Receiver and Liquidator will have the following powers:

to demand from each party a true and correct account of all assets belonging to the said joint community estate and to demand from each party they furnish him with full details of any asset which they have dealt with and to demand of each party that they indicate which assets of the joint community estate are in their respective possession."

³ 1992 (4) SA 490 (W) on page 494 at [B].

⁴ See footnote 1.

accumulated during the subsistence of the marriage whether movable or immovable must be valued and shared between the parties equally.

[15] The reason for opposing the application solely rests on the fact that the respondent will lose her only home, as the respondent anticipated that the immovable property will be sold following the investigation by the Receiver and Liquidator.

[16] It was argued that Mr. M[...] disposed of all other the assets of the joint estate prior to the divorce proceedings was instituted. It was argued that the court should play its part in protecting women who may find themselves in the same position as the respondent. It was stated that in granting order the result will be a miscarriage of justice.

[17] The respondent argued that Mr. M[...] has already directly stripped the Receiver and Liquidator of her powers, because he has disposed of all the assets of the joint estate prior to the granting of the divorce order. It was argued that the applicant is assisting Mr. M[...] in his unconstitutional and inhumane deeds by forcing and directing the respondent to relinquish the only asset that she has left, which is her home, the immovable property which she occupies with the children. The respondent therefore requested the application to be dismissed.

Case law and evaluation

[18] Section 7 (1) and 7(2) of the Divorce Act, Act 70 of 1979, states that the court granting a decree of divorce may, either in accordance with a written agreement entered by the parties, or *mero moto*, in the absence of such an agreement, make an order with regard to the division of the assets of the parties

[19] To enable the court to perform or comply with the order of division of the joint estate, the court has the power to appoint a Receiver and Liquidator to realize (which means value and sell the assets) and divide the assets of the joint estate on its behalf.

[20] The Receiver and Liquidator will be granted, in accordance with the court order with sufficient powers to value, determine and calculate the accrual which powers includes a general power of attorney to market, sell and realize any immovable property, power to approach any financial institution to obtain balance statements of investments, savings account and pension funds. This will include providing the financial institutions with specific instructions to withdraw any amount from such accounts.

[21] In short the Receiver and Liquidator will step into the shoes of the parties and effectively have the power to access all their financial information. A Receiver and Liquidator is an officer of the court, who is vested with authority to deal with the assets of the joint estate under the direction of the court

[22] Upon realising the accrual the Receiver and Liquidator has the powers to distribute the accrual between the parties by way of either selling all the property to obtain funds or by way of distribution of the property. The Receiver and Liquidator has ultimate powers and has the final say on how to divide the assets or the accrual, although the final report of the Receiver and Liquidator might be taken for review in circumstances where the Receiver and Liquidator acted *male fide* or did not act in the party's interest.

[23] The following is not in dispute;

- i. The respondent and Mr M[...] was divorced on 2 November 2015 and in terms of the divorce order a Receiver and Liquidation had to be appointed in order to deal with the division of the joint estate's assets.
- ii. The immovable property currently under the control of the respondent forms part of the joint estate.
- iii. The applicant, Mrs Hlalelani Kathleen Matolo-Dlepu was appointed in the capacity of Receiver and Liquidator on 10 December 2020.
- iv. In terms of the court order dated 2 November 2015 the main functions attached to the applicant are:
 - a) The evaluation of all the assets (movable and immovable) in the joint estate except personal belongings, including accessing such premises where the assets might be for such evaluation;

- b) To investigate claims of assets being hidden by either of the parties;
- c) Establishing the liabilities of the joint estate; and
- d) Requesting a factual/accurate inventory or account of either or both of parties.

vii . Mr M[...] met with the applicant in terms of the court order and has complied with the court order.

[24] Therefore due to the resistance of the respondent to meet with the applicant necessitates the application.

Evaluation

[25] It is evident from the attached correspondence that the respondent wilfully refused to meet with the applicant in order for her to comply with the court order dated 2 November 2015.

[26] Counsel for the respondent argued that a counter application will be launched in order to vary the court order dated 2 November 2015. Such application is not before me, therefore the counter application will not be discussed for purposes of the judgment.

[27] It is important to mention that the respondent was personally served with the Notice of Motion, the summons pertaining to the divorce proceedings which was set down on 2 November 2015. During the divorce proceedings no defence or plea were noted by the respondent and the divorce order was granted. Thus at the stage of the divorce hearing there was no request from the respondent that Mr. M[...] should forfeit any benefit of the joint estate and no such order was made.

[28] It is evident that the respondent from the onset of the appointment of the applicant as Receiver and Liquidator did not co-operate. Numerous notices were sent to the respondent informing her what the scope of her duties as appointed Receiver and Liquidator entails. The applicant emphasized the fact that she does not act as legal representative of Mr. M[...], but she performs her duties in terms of the court order dated 2 November 2015. However the respondent persisted in not attending the scheduled meetings. It is clear that the respondent is not amenable to

co-operate. The conduct of the respondent is clearly prejudicial to the applicant as she is unable to finalize the division of the joint estate.

[29] The arguments presented by the respondent have no merit. The respondent argued that her failure to attend meetings with applicant was due to the fact that the immovable property is the respondents primary residence. This argument has no merit when deciding on the facts put forward in the application. The immovable property forms part of the joint estate and must be handled in accordance with the court order dated 2 November 2015. The respondents conduct in face of the court order dated 2 November 2015 verges on the contempt of court.

[30] The applicant stated that Mr M[....] attended meeting in accordance with the notice sent to him, therefore the applicant would have investigated any assets and the value thereof in the possession of Mr M[....], which will be included in her final report for distribution of the joint estate. When the respondent attends the meeting with the applicant, she can put forward all information relating to the joint estate's assets that according to her Mr. M[....] sold or misused prior to the divorce being finalized

[31] Furthermore the distribution report compiled by the applicant will be made available to the respondent and Mr. M[....], and if either party are not satisfied with the contents of the report, they have fourteen (14) days to note their dissatisfaction and to review the report. Therefore the respondent has a further remedy during the process of distribution of the assets of the joint estate in the event that the Receiver and Liquidator did not comply with her duties diligently.⁵

Conclusion

⁵ Paragraph (xxvii) of the court order makes the following provision;

The Receiver and Liquidator have the following powers:

(xxvii) prepare such interim and/or final accounts between the parties as he may deem necessary from time to time and, when the liquidator has prepared the final account in terms of this order, to send a copy of same to both parties by prepaid registered mail or deliver a copy thereof to the offices of any Attorneys representing them and the parties shall be entitled to raise objections to the said account within fourteen (14) days from the date of such account having been sent, in which event the liquidator shall rule on such objection and either allow or disallow same, either in whole or in part, and in which event the liquidator shall send to the parties his decision which shall become final and binding on the parties should they not approach this Court for relief within fourteen (14) days of the date of the liquidator's final decision;

[32] I am therefore satisfied that the applicant has made out a proper case for the application to compel the respondent to attend scheduled meeting/s with the applicant as prayed.

Costs

[33] The applicant in the matter prayed for an order of cost on an attorney and own client scale.

[34] The basic principles governing granting of cost orders in civil litigation is that the judicial officer has the discretion in granting same, but that costs should generally follow the result.⁶

[35] The most important principle is that where a party has been substantially successful in bring or defending a claim, that party is generally entitled to have a cost order made in favour against the other party who was not successful.

[36] In the matter of *Ben McDonald Inc v Rudolph*⁷ Van Dijkhorst J summarised the terminology used for categories of costs, stating inter alia the following:

“1. Party and party costs: These costs are awarded against the losing party in litigation and are taxed in terms of Rule 70 with a view to a full indemnity to the successful party but limited to costs necessary or proper for the conduct of the litigation . . .

2. Attorney and client costs:

2.1 In cases where the client himself is to pay them, this means the same as attorney and own client costs as defined below.

2.2 In cases where the losing party in litigation is to pay them to the successful party this means all reasonable costs incurred on behalf of the client although not strictly necessary or ‘proper’. . .

2.3 Attorney and own client costs, whether in the sense of 2.1 above or where they are to be paid by the losing party to the successful party, means all costs incurred except where unreasonable. Agreed items or amounts are presumed to be reasonable . . .”

⁶ See The Law of Costs (2006) by A Cilliers at paragraph 14.04.

⁷ 1997 (4) SA 252 (T) on page 255 at paragraph D-J.

[37] In *The Law of costs*⁸ the following was noted;

“The ordinary rule is that the successful party is awarded costs as between party and party. An award of attorney and client costs is not lightly granted by the court: the court leans against awarding attorney and client costs, and will grant such costs only on “rare” occasions. It is clear that normally the court does not order a litigant to pay the costs of another litigant on the basis of attorney and client unless some special grounds are present. An award of attorney and client costs is granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party.”

[38] The applicant has been successful in the outcome of the application and therefor is entitled to a cost order. However in awarding cost on attorney and own client scale, the court has to find that there is “*some special ground*” present, which justifies a punitive cost order. The respondent in the matter is an elderly, uneducated person. The respondent was wrongly advised by counsel on legal issues pertaining to the application. A punitive cost order will only burden the joint estate further.

[39] In the premises I make the following order:

1. The respondent is ordered to comply with the applicant's Notice Dated the 22 January 2021 to appear before the Receiver and Liquidator, submit to interrogation and furnish the true and correct account of all assets of the joint estate within five (5) days of receipt of this order;
2. The respondent failing to comply with order one (1) above, the Receiver and Liquidator may proceed with the division of the joint estate without any further consultation and/or involvement of the respondent;
3. The respondent is ordered to permit or allow the Receiver and Liquidator or any other person acting on behalf of and/or the authority or instructions of the Receiver and Liquidator to access the property including the immovable property of the joint estate for the purposes of taking full

⁸ AC Cilliers BA LLB (Stell) MA (Oxon) LLD (SA) Emeritus Professor of Law, University of Port Elizabeth.

inventory and making proper valuation of the concerned property within seven (7) days of receipt of this order;

4. The respondent refusing or failing to comply with order three (3) above, the members and/or officials of the South African Police Services are ordered or permitted and/or authorised to accompany the Receiver and Liquidator or any other person acting on behalf of and/or the authority or instructions of the Receiver and Liquidator to the property including the immovable property of the joint estate for the purposes of taking full inventory and making proper valuation of the concerned property and to remain present during the valuation and taking of the full inventory of the said property;

5. The respondent is ordered to pay the costs of this application on party and party scale.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT**

Date of hearing: 05 October 2021

Date of judgment: 27 October 2021

Appearances:

Counsel for Applicant: Katlego Shole

Instructed by: FH Munyai Incorporated

Office No: (011) 943-6178

Email: admin@fhmunyai.co.za

Counsel for Respondent:

Adv L Mulaudzi

Instructed by:

B.D MNDIYATA ATTORNEYS

Office No:

065 833 1989

Email:

mndi@mbdattorneys.co.za