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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

CASE NO: 49112/2013

DATE: 11 DECEMBER 2014

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

M[...] O[...] Applicant

and

L[...] F[...] O[...] Respondent

JUDGMENT

MOTHLE J

Introduction

1. M[...] O[...] *("the Applicant)* applies to this Court for an order that the determination by the joint referees appointed by both the Applicant and her former husband L[...] F[...] O[...] *(鍍he Respondent)* for the establishment of the accrual in the estate of the parties, be adopted in terms of the provisions of Section 19 (bis (1) of the Supreme Court Act, 59 of 1959.[1] She also applies for consequential relief, including costs against the Respondent.

2. The Respondent opposes this application.

Background

3. The Applicant and the Respondent were married to each other on the 30 June 1990, out of community of property by antinuptial contract, incorporating the accrual system contemplated in Chapter 1 of the Matrimonial Property Act, No. 88 of 1984.

4. On 16 May 2007, this Court granted a final divorce order, wherein it pronounced on issues of custody, primary residence, visitation rights and maintenance of the children. The Court order concludes in paragraph 10 thereof as follows:

> "*Dat die Verweerder 50% (Vyftig persent) in die verskil en aanwas tussen die partye se boedels aan die Eiseres oorbetaal."*

5. During or about 2008 the Applicant launched an application in this Court for an order in terms of which the accrual of the respective estates of the parties be determined. This application was based on paragraph 10 of the Court order in the divorce proceedings stated above, wherein the Respondent (*the Defendant in the trial)* was ordered to pay 50% of the difference of the accrual in the respective estates of the parties, to the Applicant.

6. During or about 16 November 2010, the parties entered into a settlement agreement relating to amongst others, the issues of maintenance and arrear maintenance that was due at that time. In paragraph 4 of that agreement, the parties agreed that pursuant to the disagreement between the parties with regard to the extent and value of the assets in the estate of the Respondent and the disclosure thereof, the parties agree to appoint two referees in terms of Section 19(bis) of the Supreme Court Act[2] 59 of 1959. Each party was to nominate his or her own referee and such referee would then represent that party.

7. This settlement agreement was made order of court on 16 November 2010 by My Acting Justice Pakati in this Court.[3] Thus the settlement agreement will, for the purposes of this judgment be referred to as the Court Order of 2010.

8. The Court Order of 2010 made provision for numerous specific powers which the referees could exercise in the course of executing their mandate, including that they needed to present a final report of their investigation to the parties in respect of the final calculation of the accrual. Of importance are Clauses 5.2.14 and 5.2.15 of the Court Order of 2010, which read as follows:

> "*5.2.14 To submit, after completion of their duties referred to herein, a fui! and final report of their investigations to both parties and their attorneys of record by no later than 31 March 2011, unless otherwise agreed to between the parties. The referee's final calculation of the accrual shall, on acceptance by the parties, be binding on the parties with the effect of a final judgment;*

5.2.15 In the event of the parties and/or referee being unable to agree to the value of the assets or liabilities or of the calculation of their accrual or any other issue pertaining to the calculation of the accrual finally, and/or any matter relating to the disposal of assets and/or the raising of any capital to finance the accrual, that any such dispute shall be referred to Judge Willie Hartzenberg or if he is unavailable, any other retired Judge, with regard to which the parties agree for the final adjudication of the disputes and to establish the accrual, finally in terms of his adjudication. His ruling and/or decision will be final and binding on the parties and there shall be no right of review or appeal against his ruling or decision;"

9. The parties appointed referees, in terms of the Court Order of 2010 in the persons Mr Louis Strydom, appointed by and on behalf of the Applicant and Mr Pieter van der Berg, appointed by and on behalf of the Respondent. Both referees are Chartered Accountants [4]

10. During the period they acted as referees, there was correspondence between them and the Respondent's attorneys wherein disclosure of certain documents was required. The delay in these exchanges between the referees on the one hand and the Respondent on the other resulted in the referees being unable to present a final report to both parties not later than 31st March 2011 as agreed to in paragraph 5.2.14 of the Court Order of 2010.

11. On 4 April 2013, the referees determined the accrual of the parties as at the date of divorce on 16 May 2007 by attaching schedule A of their findings. In terms of the determination by the joint referees, the accrual in the estate of Respondent amounted to R10,667,609.00, the particulars if which are set out in schedule A. The Applicant contends that the report of the referees is a final determination. This contention is supported by Mr L Strydom in his affidavit, supported by Mr van der Berg in a confirmatory affidavit, where the referees state thus:

" *2.6 We respectfully submit that our determination of the accrual as set out in schedule "A" is final in the absence of any new and/or additional information and/or documentation relevant to the determination of the accrual. Our reservation with regard to the "matters outstanding" is on the premise that additional evidence only in relation to the "matters outstanding" might require from us to put further evidence before the Court. In the absence of such evidence our determination as set out in schedule "A" with regard to our determination in terms of schedule "A" (is) final. In this regard we state that matters outstanding had been identified only as a consequence of information that we have required from the Respondent and which we did not receive as at the date of our determination.* "

12. The Respondent has objected to certain transactions or items listed in schedule "A" as determined by the

referees. These objections appear in detail in the answering affidavit and supplementary affidavit in this application. These objections, to which both the referees and the Applicant replied, raise a dispute between the Respondent and the referees. However, the Respondent did not refer the dispute with the referees to Judge Willie Hartzenberg or any other retired Judge as stated in paragraph 4 of the Court Order of 2010.

13. The delay in resolving the dispute resulted in the Applicant launching the present application before Court, in which she seeks relief for the adoption of the determination by the referees as a final determination as well as to order 50% of the payment due, and other consequential relief.[5]

Points in Limine

14.In opposing the Applicant's application, the Respondent raised what became points *in limine* by stating that:

> 14.1 The application is premature in that the objections to the items listed by the referees in schedule "A" have not yet been resolved between the Respondent and the referees;
>
> 14.2 That according to clause 5.2.15 of the agreement, any disputes arising out of the final determination of the referees shall be referred to adjudication by Judge Willie Hartzenberg and if unavailable, any other retired Judge; and
>
> 14.3 The settlement agreement between the parties was made an order of Court on 16 November 2010 and can only be set aside on appeal.

15. Counsel for the Applicant and for the Respondent addressed the Court on these points *in limine* raised by the Respondent. The Court, after hearing argument, ordered that the matter be referred to Judge Willie Hartzenberg and if unavailable, to any other retired Judge.[6]

16. In making the order, the Court indicated to the parties that the reasons thereof will follow. I now turn to provide reasons for the Court order.

Reasons for the Court Order

17. It is common cause that 7 years has elapsed since the Court granted the decree of divorce in 2007, wherein it ordered the Respondent[7] to pay to the Applicant[8] 50% of the difference of the accrual in the respective estates of the parties. The Applicant submits that this delay was caused by the Respondent failing to co-operate with the referees, in particular failing to submit source documents to support the items to which he objects.

18. On a proper reading of the affidavits in this application, it seems to me that the referees also have their own share of blame for the delay in making the determination. The settlement agreement which has been made an order of Court, endowed them with powers to enforce, through the Courts, the acquisition of information and/or documentation from the Respondent or any other party who may be in possession thereof. This they did not do. The end result is that the Applicant, 7 years down the line, has not received her 50% share of the accrual determined from the estate of the Respondent as at the date of divorce. This indeed is to her prejudice.

19. The Courts have recognised the tendency to delay the calculations of the amount accruing to the one party. In this regard I refer to the remarks in the unreported judgment of the Supreme Court of Appeal in the matter of *DEB v MGB*[9], wherein the Court stated thus:

> "*[39] The attitude of many divorce parties, particularly in relation to money claims where they control the money, can be characterised as "catch me if you can". These parties set themselves up as immovable objects in the hopes that they will wear down the other party. They use every means to do so. They fail to discover properly*; *fail to provide any particulars of assets within their peculiar knowledge and generally delay and obfuscate in the hope that they will not be "caught" and have to disgorge what is in law due to the other party.*

20. Even though Mr Diedericks, the erstwhile attorney of the Respondent notified the Applicant's attorney of the Respondent's objection to the inclusion of certain amounts in the referees' report, the Applicant only came to know of the actual details of the objection after she filed this application and the Respondent filed an answering affidavit thereto. In her replying affidavit, the Applicant, supported by the referees who filed affidavits, deals with the objections raised by the Respondent.

21. Counsel for the Applicant submitted, with reference to authorities[10] that there is no dispute between the Respondent and the referees. In *casu*, it is my view that to establish whether the Respondent has a bona fide dispute, one has to evaluate the merits of the Respondent痴 objection and not solely rely on the Applicant痴 version in that regard. It seems to me that though the Respondent has initially failed to provide the details of the grounds of objection, he has now done so in his answering affidavit. It is thus clear that a dispute of fact between the Respondents and the referees has emerged on the papers, which may require oral and documentary evidence to be considered in making a determination.

22. The Respondent is correct in stating that paragraph 4 of the Court Order of 2010 provides that such dispute should be referred to Judge W Hartzenberg, if unavailable, to any other retired Judge. This Court cannot ignore its own order of 2010 and proceed to adjudicate on the merits of this application. Another

difficulty with this application before Court is that the referees, whose determination is being disputed, are not cited 9s parties. The Court cannot therefore, in their absence, make an order or directive affecting them, without them being heard.

23. Section 19 (bis) (1) (c) of the Supreme Court Act, *supra*, in dealing with the fate of the referees' report, provides the Court with a discretion to make "*such other order in regard thereto as may be necessary or desirable*.I am thus of the view that it is necessary or desirable, as per Court Order of 2010, to refer this application in which the disputes are raised, for adjudication by Judge Willie Hartzenberg and if unavailable, any other retired Judge.

24. In the premises I make the following order:

i That pursuant to the settlement agreement between the parties which has been made a court order *("hereinafter referred to as the Order of Court")*, this application is referred to Judge W Hartzenberg or if he is unavailable, any other retired Judge, for the final adjudication of the disputes and to establish the accrual, finally in terms of his adjudication. His ruling and/or decision will be final and binding on parties and there shall be no right of review or appeal against his ruling or decision.

ii That the Applicant shall within ten (10) days of the date of this order and under cover of a memorandum copied to the Respondent, approach Judge Hartzenberg with a request that he adjudicate on this matter in terms of the order of Court;

iii That in the event Judge Hartzenberg is unavailable to adjudicate on this application, the parties, as per Order of Court, shall within 20 (twenty) days of being so advised, of the unavailability of Judge W Hartzenberg, agree on a list of three (3) retired Judges who shall each be approached with a request to adjudicate this application;

iv That if the parties are either unable to agree on the list, or are unable to secure the services of a retired Judge to adjudicate this application, any of the parties may approach the office of the Judge President or Deputy Judge President of this Division for further assistance in disposing of this application;

v This application, in which the parties have filed their affidavits and annexures, shall, with the exclusion of the interlocutory applications, constitute the entire application before Judge W Hartzenberg or any other retired Judge appointed to adjudicate on this matter. Any other further documents shall be filed only with the leave of the presiding Judge who will be adjudicating this matter; and

vi That the costs of this application are reserved for determination by the adjudicator or the Court that will be seized with the adjudication of this application.

MOTHLE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

Mr M Badenhorst SC Assisted by Mr JA Klopper *Instructed by:*

Tintingers Inc. Pretoria.

For the Respondent:

Mr NS Kruger *Instructed by*

Messrs Schuman Van Den Heever & Slabbert, Pretoria.

footnote1