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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 32913/20

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

Date: 9 September 2021 E van der Schyff

In the matter between:

P P N[....]

EXCIPIENT

and

S N M[....]

RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] This is an exception in terms of Rule 23(1) of the Uniform Rules of Court. The excipient (defendant) excepts to the respondent's (plaintiff's) particulars of claim on the basis that the said particulars of claim lack averments which are necessary to sustain an action, and does not disclose a valid cause of action.
- [2] From the amended particulars of claim, it is evident that the plaintiff and the defendant reside in the court's jurisdictional area. Under the heading AD CAUSE OF ACTION, the following averments are made:
- i. The plaintiff and the defendant were married in community of property. Their marriage was dissolved on 8 October 2017. The decree of divorce provides for the division of the parties' joint estate.
 - ii. As of the date of divorce, the parties' known assets comprised an immovable property to the value of R630 000 and a motor vehicle to the value of R12 000.00.
 - iii. The parties' liabilities comprised a personal bank from Nedbank (R70 564.02), a personal loan from African bank (R29 195.24), a personal loan from Bay Port (R10 333.79), a home loan in favour of SA Home Loans over the immovable property (R432 820.15) and an ABSA credit card (R5 692.21).
 - iv. As of the date of divorce, the plaintiff was responsible for the bond repayment. He stayed at the property as the defendant vacated the property.
 - v. The defendant's refusal to contribute towards bond repayment and his own financial constraints forced the plaintiff to let out the property to third parties for R4000.00 per month. He utilised this amount for the bond repayment.
 - vi. During March 2018, the defendant offered to buy the plaintiff's half share in the property for R100 000.00 and undertook to pay the electricity and municipal services. She took occupation of the property on 1 April 2018.
 - vii. The defendant did not honour her undertaking to pay the bond, electricity, and municipal services. On or about 6 April 2018, SA Home Loans issued summons for the full repayment of the mortgage loan and a declaration of executability.

- viii. The plaintiff paid R2 645.00 to obtain a sworn valuation of the property. SA Home Loans subsequently obtained default judgment against the defendant and an order declaring the property executable. A reserve price of R485 000.00 was set. The claim against the plaintiff was postponed *sine die*.
- ix. The defendant refused or failed to allow potential buyers on the property or to sign the documentation allowing SA Home Loans to sell the property, and they enrolled the matter against the plaintiff for summary judgment. The plaintiff made payment in the amount of R40 000.00 towards the arrear bond payment. Through the plaintiff's effort and expense, the property was sold to a third party for R630 000.00. To enable the transfer of the property, the plaintiff incurred additional expenses of R900.00 for an electricity compliance certificate. The amount of R90 892.03 remains to be divided between the parties. An amount of R5 000 was paid to the South African Revenue Services.
- x. The plaintiff was never compensated for the payment of R2 645.00 (sworn appraisal), R40 000 (arrear bond repayment), and R900.00 (electricity compliance certificate). These amounts compute to R43 545.00.
- xi. The plaintiff formulated three claims.
- xii. Regarding Claim A, he states-
 - He addressed a letter to the defendant on 6 September 2018 requesting her to choose one of three options – (1) to buy his share in the property and be liable for the costs relating to the property as of 1 October 2018; (2) rent the property and be liable for the monthly rental of R4500 per month from 1 April 2018 and pay municipal services at the property from 1 October 2018; or (3) the parties agree to rent out the property to third parties as from 1 October 2018 and use all rental income to repay the bond;
 - The defendant never paid any occupational rent for her occupation of the property or moved out for the property to be let out to third parties;
 - As a result of the defendant's failure to honour the parties' agreement of buying the plaintiff's share of the property, refusal

to pay occupational rent or vacate the property for it to be let out to third parties, the parties were deprived of the potential to generate income in the form of occupational rent of an amount of R76 000.00.

- The plaintiff claims that an amount of R38 000.00 'be subtracted from the distribution to the defendant and added to the distribution of the plaintiff.'

xiii. Regarding Claim B, the plaintiff claims that the amount of R5 000 paid from the proceeds of the property to the South African Revenue Services does not form part of liabilities of the parties' erstwhile joint estate. He claims that an amount of R2 500 'be subtracted from the distribution to the defendant and added to the distribution to the plaintiff.'

xiv. Regarding Claim C, the plaintiff avers that:

- the parties are at loggerheads about the assets, liabilities, and claims forming part of their erstwhile estate and the manner in which such joint estate should be distributed;
- he claims that the amount of R43 545.45 should be refunded to him from the proceeds of the property;
- he avers that his litigation costs in defending the action to declare the property executable should be born in equal shares by him and the defendant;
- he avers that the only liabilities that the parties could prove are his personal loans and the defendant's credit card debt to ABSA as set out above at iii.
- Despite his requests for the parties to meet or engage the services of a liquidator to assist the parties to divide their joint estate, the defendant failed or refused to co-operate;

xv. He claims that (1) prior to the 'distribution of the assets of the parties an amount of R43545.45 be subtracted from the assets of the parties' erstwhile estate and be paid directly to him; (2) the defendant is liable to pay half of the legal costs incurred by him for defending the litigation instituted by SA Home Loans under case number 16298/2018; and (3) the recognition of the

parties' liabilities as set out in iii above, as the liabilities to the parties erstwhile joint estate.

[3] The excipient avers that the particulars of claim fail to disclose a valid cause of action and that the plaintiff does not possess the required *locus standi* in the litigation and the claim it has instituted. Because the court order wherein the division of the joint estate is decreed does not contain any provision in respect of any adjustment to the division of the joint estate such adjustment cannot be effected post-divorce. The excipient relies on the judgment in *M v M* (82156/14) [2017] ZAGPJHC 354 (20 November 2017) at para 15, where the court held that s 15(9)(b) of the Matrimonial Property Act, 88 of 1994 (the MPA) must be pleaded and ventilated in the pleadings during a divorce. According to the excipient, the plaintiff seeks to claim on behalf of the joint estate, and an adjustment of the joint estate post-divorce. The excipient contends that the correct relief would have been for the court to appoint a receiver or a liquidator and emphasised that there cannot be any adjustment to the division of the joint estate post-divorce because it was not specifically ordered at the time of the divorce.

[4] The plaintiff, on the other hand contends that he seeks:

- i. Claim A: Payment of R38 000.00 deriving from damages he suffered due to the defendant's failure to perform in terms of the parties' oral agreement that the defendant would buy out the plaintiff's half share in the immovable property.
- ii. Claim B: Payment of R2 500 to be subtracted from distribution to the defendant and added to his distribution because the debt he paid to SARS subsequent to the sale of the immovable property does not form part of the liabilities of the erstwhile estate.
- iii. Claim C: Payment of R43 545.45 as costs and expenses incurred in preventing the immovable property from being sold in execution together

with half of the legal costs incurred, to be deducted from assets forming part of the parties' erstwhile estate before the parties can share in their erstwhile joint

- iv. Claim C: A declaratory order confirming assets and liabilities that formed part of the parties' erstwhile estate as at the date of divorce.

[5] The plaintiff claims that he is not relying on s 15(9)(b) of the MPA. The claims relate to events that took place post the parties' divorce. He submitted that he seeks the court to divide the joint estate.

Discussion

[6] While a divorce order has the automatic effect of terminating the community of property between the parties, the actual division of the joint estate can take place later.¹ In practice, the division of a joint estate seldom presents difficulties. The parties usually agree on how the division should be done. *In casu*, the parties could not come to such an agreement, and the plaintiff incurred certain expenses post-divorce in his attempt to preserve the value of the immovable property that forms part of the joint estate.

[7] In *Gillingham v Gillingham*² the court explained:

"The law governing this matter seems to me perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a Court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in

¹ *Ex parte Menzies et uxor* 1993 (3) SA 799 (CPD) at 815A-C, *CJ Pelser N.O. and another v Lessing N.O. and 4 others* (5034/13).

² *Gillingham v Gillingham* 1904 TS 609.

possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint some person to effect the division on its behalf. Under the general powers which the Court has to appoint curators it may nominate and empower someone (whether he is called liquidator, receiver, or curator . . .) to collect, realise, and divide the estate. And that that has been the practice in South African Courts is clear."

[8] In *Phalatsi v Phalatsi*³ the court referred to the passage cited above and stated:

'In other words, in the absence of an agreement between the parties the Court may order the division itself, or it may appoint someone to effect the division on its behalf. '

[9] A party seeking the Court's intervention to facilitate the division of the joint estate must plead and prove that (i) a marriage in community of property has been dissolved by a decree of divorce; (ii) the joint estate stands to be divided; (iii) the parties cannot reach an agreement to an amicable division.'

[10] These averments are contained in the particulars of claim. The exception raised is that the particulars of claim lack averments that are necessary to sustain an action. In *Living Hands (Pty) Ltd and another v Ditz and another*,⁴ the court distilled the general principles applicable when exceptions are decided from case law, amongst others that:

'an excipient who alleges that a summons does not disclose a cause of action, must establish that upon **any construction of the particulars of claim**, no cause of action is disclosed.' (My emphasis)

[11] The plaintiff pleaded the *facta probanda* that would enable a court to either divide the joint estate or appoint a liquidator. The plaintiff makes the necessary

³ *Phalatsi v Phalatsi* [2017] JOL 37885 (FSB) at para [5].

⁴ 2013 (2) SA 368 (GSJ) at para [15].

averments that certain expenses were incurred in an attempt to preserve the value of the immovable property in the joint estate, for the benefit of joint estate. A trial court will be able to determine if and how these expenses must be accounted for when the joint estate is divided.

ORDER

In the result, the following order is made:

1. The exception is dismissed with costs.

E van der Schyff
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 9 September 2021.

For the excipient:	Mr. J Nysschens
Instructed by:	Johan Nysschens Attorneys
For the respondent:	Mr. Mashamaite
Instructed by:	Mashamaite MR Attorneys Inc.
Date of the hearing:	25 August 2021
Date of judgment:	9 September 2021