

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ✓	
02/08/2022	
DATE	SIGNATURE

CASE NO: 9256/21

In the matter between:-

ANEEL DARMALINGAM N.O.

Applicant

and

ANA PAULA REAL MARQUES

First Respondent

FRANKLIN BERNADINO DE SOZA MARQUES

Second Respondent

JUDGMENT

SKOSANA AJ

[1] This is an application for leave to appeal brought by Ms Marques, the first respondent in the main application. It is opposed by the liquidator, who was the applicant in the main application. Mr Marques remains inactive in the matter. I refer to Ms Marques either by name or as the applicant and Mr Aneel Darmalingam N.O. as the respondent/liquidator.

[2] The preamble to the application for leave to appeal states that leave to appeal is sought against the whole of my judgment and order though the grounds contained in the body thereof only mount a challenge against a portion of thereof, i.e. my findings in relation to grounds 1, 3, 5, 7 and 8 of Ms Marques's grounds of objection against the Amended Final Account (AFA). This, in my view, renders the application defective as it creates confusion as to whether the whole judgment including the findings that are in favour of the applicant or only a part thereof is challenged. Counsel for Ms Marques could not clarify this satisfactorily.

[3] Be that as it may, the applicant has made submissions on the four grounds as well as costs. I will only deal directly with two on which the applicant strongly relies.

[4] **Ground 8**

This ground relates to the legal costs incurred by the applicant in relation to the divorce but prior to the division of the joint estate. The liquidator refused to include such costs in the consideration of the joint estate. I rejected the applicant's objection against such decision primarily on the basis that the costs of the divorce proceedings were reserved at that point.

[5] The applicant insists that legal costs incurred in respect of divorce proceedings should be a claim against a joint estate as they are incurred before the division thereof. He submits that this is an important point to be pronounced upon by the SCA. I disagree. Although such legal costs are normally incurred before the finalization of the divorce and the division of the joint estate, the invoice is normally rendered and paid at the end. Even if they were paid before, I would be very reluctant to conclude that they automatically constitute a claim in the joint estate. Otherwise, provisions such as Rule 43 for claiming a contribution towards the legal costs of a matrimonial action would be rendered nugatory. That approach would also produce undesirable consequences in that parties to a divorce would gratuitously incur legal costs based on the motive that they will be readily payable by the joint estate.

[6] Taking into account that such costs are incurred almost in their entirety prior to the division of the joint estate, the proposed principle is clearly at odds

with reality. Again, such an order would have been no more than an inappropriate pre-emption of the costs order previously reserved by the divorce court.

[7] On this basis, I can find no reasonable prospects that an appeal court will find differently on this point.

[8] **Ground 5**

This related to the legal costs incurred by the liquidator in relation to the division of the joint estate. My finding on the interpretation of paragraph 26 of the powers of the liquidator have, in my view, not been intelligibly challenged. I do not see how the “*right to engage the services of any suitably qualified person*” to assist the liquidator in performing his obligations can and should exclude legal practitioners.

[9] In fact, the legal proceedings that ensued between the applicant and the liquidator are connected to or even a continuation of the legal advice and services that the liquidator had sought and obtained earlier. If he was not permitted to employ lawyers then, he would also not have been permitted to instruct attorneys and advocates for the proceedings that came before me. It is for this reason that I find this ground of appeal as weak.

[10] As to the rest of the grounds for leave to appeal, I find no merit in any one of them. They merely represent the subjective views of the applicant on the facts and have been sufficiently addressed in my judgment.

[11] **Costs**

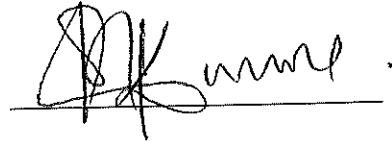
As regards the costs of this application, the applicants' counsel submitted that the liquidator should not have opposed it. Again, I do not agree. The liquidator brought an application on which I made a finding and in the exercise of my discretion decided that the costs of the main application and the counter application be borne by the joint estate. No submission or allegation was made that my discretion was exercised injudiciously. My rejection of 5 out of 9 objections of the applicant placed the parties at almost the same level in regard to success. In any event, the liquidator was justified and acted rather wisely in seeking the imprimatur by this court before taking further action.

[12] However, the applicant's application for leave to appeal has no merit and is defective as pointed out above. I therefore find it proper that the applicant should carry the costs of this application.

[13] I therefore order as follows:

[1] Leave to appeal is refused.

[2] The applicant (Ms Marques) is ordered to pay the costs of this application.

A handwritten signature in black ink, appearing to read 'DT Skosana', written over a horizontal line.

DT SKOSANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:

Instructed by:

Counsel for the First Respondent:

Instructed by:

Adv MP van der Merwe SC

Jarvis Jacobs Raubenheimer Inc

Adv DS Hodge

Steve Merchak Attorney

Care of MACINTOSH, CROSS &

FARQUHARSON

Date heard:

02 August 2022

Date of Judgment:

02 August 2022