IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

(3) REVISED

_____ _____

DATE SIGNATURE

CASE NO: 9256/21

DATE: 31 JANUARY 2022

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] In this matter, the applicant, Mr Darmalingam, has brought an application for certain orders in respect of the division of the joint estate of the first and second respondents. The applicant is a liquidator for the division of such joint estate and is also a chartered accountant. In summary, the relief sought by the applicant amounts to the following:

1.1 A declaratory order entitling the applicant to divide the joint estate in accordance with his amended final account (AFA);

1.2 In the alternative, that this court should give directions in relation to the manner in which such AFA should be amended and that the estate is divided in accordance therewith;

1.3 Certain ancillary orders be granted in terms of which the applicant is granted powers to deal with the assets of the joint estate and to enter into appropriate transactions in relation thereto; and

1.4 The applicant also seeks an order of costs against the first respondent.

[2] The first respondent does not only oppose the main application but has also filed a counter application in which she seeks the review and setting aside of the AFA and that such AFA be amended to align with her objections against it. The second respondent has not opposed either of the applications nor has he actively participated in these proceedings.

[3] The relevant factual background of this matter can be shortened as set out hereunder.

[4] The respondents are married to each other in community of property. The second respondent instituted divorce proceedings subsequent to which a court order was granted by agreement between the parties on 18 October 2016 in the following quoted terms:

"1. Save for the division of the joint estate, the remainder of the issues between the parties being the granting of a decree of divorce, the Defendant's spousal maintenance claim and costs of the action are postponed sine die;

2. *The joint estate as at 18 October 2016 is divided equally between the parties in the manner as set out hereunder;*

3. *The costs of the division of the joint estate, including but not limited to the transfer of movable assets, transfer costs and fees of the immovable properties into the parties' respective names and the costs of the liquidator, if required, shall be paid from the joint estate;*

4. *In the determination of the assets of the joint estate the parties shall provide one another with full disclosure of the estate assets, including sworn valuations on the two immovable properties situated at ST MICHAEL, KWA ZULU-NATAL and EMFULENI ESTATE, Gauteng, if required, the costs thereof to be paid from the joint estate;*

5. *The Defendant will have access to the EMFULENI APARTMENT excluding the boathouse ("the apartment") from 1st November 2016 which access shall specifically include the ability, at her election, to let the apartment to suitable tenants so as to supplement her income;*

6. *The Plaintiff shall have access to the ST MICHAELS PROPERTY from 1st November 2016 which access shall specifically include the*

ability to let the St Michaels property to suitable tenants so as to supplement his income;

7. *In the event of the parties being unable to effect an equitable and equal division and distribution of the joint estate on the terms and conditions suitable to them, within a period of 4 (four) months from the date of the granting of this order, the liquidator shall be appointed (in the manner set out below) in order to attend to the division and distribution of the joint estate in accordance with the powers as contained in annexure "A" hereto;*

8. *The liquidator shall be selected and appointed by the parties, within 1 (one) month of the expiry of the period referred to in paragraph 7 above, failing which the liquidator shall be nominated by the President for the time being of the South African Institute of Chartered Accountants (alternatively its equivalent or successor);*

9. *The costs of the divorce action and the postponement are reserved".*

[5] Following the failure of the respondents to agree and effect an equitable and equal division and distribution of the joint estate, a liquidator in the

person of the applicant was appointed as provided for in paragraphs 7 and 8 of the afore-quoted court order.

[6] After investigations and various discussions with the respective parties over a period of almost 3 years, the applicant issued a final account proposing the manner in which the joint estate was to be divided. Both the first and second respondents objected to such final account with the result that the applicant had to re-draft it to cater for the respective objections culminating in the production of the AFA. In doing so, the applicant utilized the services of a firm of attorneys in relation to legal advice in respect of such AFA. Initially such AFA contained what the applicant refers to as an error in relation to the value which was utilized for one of the immovable properties which was the market sale value instead of the forced sale value. As a result, the AFA was amended accordingly in terms of which such value was altered to the forced sale value.

[7] After the AFA had been provided to the parties, only the first respondent objected to such AFA on 04 November 2020. The objection contained 9 grounds of objection, each of which will be dealt with later herein. As a result of the complexity of the matter, the applicant's attorney decided to brief counsel in order to obtain a more reliable legal advice in relation to the objections and the manner in which they should be responded to. Consequently, on 27 November 2020, the applicant furnished a written

response to the first respondent's objections which in essence overruled all of them.

[8] At the conclusion of the letter of response, the applicant suggested to the first respondent that the objections either be withdrawn so that he can deal with the estate in accordance with the AFA or alternatively that the respondent should take the AFA to court on review so that the matter may be finalized in accordance with the directions of the court. The applicant afforded the first respondent 30 days to make the afore-mentioned election. The applicant's letter also indicated that if the objection is not withdrawn and the review is not instituted, the applicant will have no option but to bring an application to court in order to obtain the directions of the court.

[9] On 18 December 2020, the first respondent submitted a reply letter through her attorney in which an extension for their response was requested until the end of January 2021. However, on 01 February 2021 the applicant received what he perceived to be a hostile response from the first respondent. What is clear though is that the first respondent was not intent on withdrawing her objections against the AFA. She also did not make a clear election as whether she would bring the suggested review in court and if so when. All that was stated in the letter was that counsel would be consulted during the course of that week in relation to steps to

be taken. No further indication was made thereafter as to the course that the first respondent was advised to follow at least until the opposing affidavit to the main application was served together with the counter application in April 2021.

[10] After filing her notice of opposition, the first respondent filed her answering affidavit on 21 April 2021 together with the counter application as referred to above. Thereafter the applicant filed its answering affidavit to the counter application as well as a replying affidavit to the main application which was followed by the first respondent's replying affidavit in respect of the counter application.

[11] In his argument, Mr van der Merwe for the applicant indicated that he is not pursuing his point relating to the delay in respect of the filing of the review by the first respondent. He however maintained that the main application was necessary as the estate could not be divided in accordance with the AFA without certainty that such process would not be challenged later through either the review or otherwise. Moreover, the powers granted to the applicant in terms of the annexure to the court order also entitled him to institute such application.

[12] In my view, the applicant was not only entitled but also justified in bringing the main application. The first respondent had requested an extension to

respond by the end of January 2021. However, her response was neither a withdrawal of any of her objections nor did she indicate whether she would bring the review in court either in her letter or after the end of the week in which the contemplated advice from counsel would have been obtained. All that the first respondent did was to oppose the application after it was served on her on 16 March 2021 and only then served her counter application for review. There is no evidence that she would have brought the review at any given time before 23 February 2021.

[13] In any event, it seems to me that the first respondent only brought the counter application for review as a reaction to the main application notwithstanding that the applicant's letter of 27 November 2020 had advised her of that option. Moreover, the first respondent had access to ample legal advice at all material times. I am also in agreement with the applicant's counsel that the first respondent could have achieved the same results that she seeks to achieve through the review by simply opposing the main application and persuading the court to apply paragraph 2 of the notice of motion to the main application to effect the adjustments to the AFA as suggested in her objections.

[14] Having stated the above, I now proceed to deal with each ground of objection as raised by the first respondent. It is important to point out in this regard that, this being a review whether in terms of the common law or

in pursuance of the provisions of the court, this court is concerned with the reasonableness of the applicant's response to the first respondent's objection against the AFA or the soundness of the reasons for rejecting it.

GROUND 1

[15] This ground of objection related to the use of the forced sale value in respect of the immovable property that is being retained by the second respondent. The applicant contends that the force sale value has been justifiably used because there is no willing or able seller and that the first respondent has no difficulty when the force sale value is used in respect of other assets, albeit movable the ones such as the BMW vehicle which is to be retained by the first respondent as well as the Hilux motor vehicle. On the other hand, the first respondent contends that since the immovable property is to be retained, there would be no diminution in the value and there is no suggestion that the second respondent will sell or needs to sell the property. There is also no basis for comparing the value used in respect of the movable assets.

[16] I am of the view that the application of the forced sale value in respect of these immovable assets is proper. Although the asset is not on sale at the moment, it is a disposable asset which will require the transfer of ownership at a sale thereof. It is my view that the circumstances, viewed

as at the time of the division of the estate, justify the use of the force sale value in respect of this asset. There is no allegation that a different standard was used in respect of the immovable property in the hands of the first respondent.

GROUND 2

[17] This ground relates to the fact that there was no valuation of the movable assets when the distribution thereof between the parties was considered. In my view, as pointed out by the first respondent's counsel, the movable assets are not necessarily of little or negligible value. As a matter of fact, such statement cannot be justifiably uttered without a proper valuation thereof. As required by the court order, a disclosure of all such assets need to be made followed by the proper valuation thereof to ensure that the distribution as suggested by the applicant is fair and just. Consequently, I find that the applicant's rejection of this ground of objection was unreasonable and accordingly this ground of objection is upheld.

GROUND 3

[18] This ground relates to the storage costs which the first respondent alleges should not feature in the assessment of the division of the estate as the

assets were stored at a friend and the costs thereof incurred after the division of the joint estate. I find this objection self-defeating when regard is had to ground 2 which require the movable assets to be subjected to valuation. Owing to the first respondent's insistence that the movable assets are not of insignificant value, it is necessary to provide proper storage thereof which in turn justifies the storage thereof at the cost of R2 500-00 per month. Such expense is also important and necessary for the preservation of the value of such assets. Accordingly, this ground of review was justly rejected by the applicant.

GROUND 4

[19] This ground relates to the fees of the liquidator which were charged at 10% of the value of the assets of the joint estate. It is common cause that there is no statutorily set tariff in respect of the fees of the liquidator. During argument, counsel for the applicant argued that the 10% used for the fees of the liquidator is in line with the fees charged by executors and liquidators in insolvent estates in terms of the Insolvency Act and/or the Companies Act. The respondent's counsel was amenable to the proposition whereby the liquidator's fees would be charged in accordance with the tariff as set out in the afore-mentioned statutes. It is my respectful view that the latter proposal will ensure that the fees charged are reasonable and fair. In the circumstances, I uphold the first respondent's

objection in this regard with the rider that the fees of the liquidator should be charged in conformity with the tariff as set out in either of these statutory instruments. The AFA should be adjusted accordingly.

GROUND 5

[20] This ground relates to the fees incurred in respect of the legal services occasioned by the instruction of lawyers by the applicant.

[21] Initially, the first respondent's counsel contended that paragraph 26 of the powers of the liquidator[1] did not entitle the liquidator to procure such legal services at the expense of the joint estate in that the professional services to be so procured by the liquidator were limited to those that relate to the determination of the true and proper value of the assets of the joint estate.

[22] Paragraph 26 of such powers states as follows:

> *"26 The right to engage the services of any suitably qualified person or persons to assist him in performing his obligations in terms hereof and, in particular, determining the true and proper value of any assets of the joint estate including any interest or share in any close-corporation, partnership, company and/or business and pay to such person the reasonable fees which may be charged by him".*

[1] **Annexure "A" to the court order**

[23] I pointed out that from the use of the conjunction 'and' just before the phrase 'in particular' in the quotation above, it is clear that the appointment of professionals for determining the true and proper value of the assets is in addition to the wider power to appoint professionals who can assist the liquidator in the general performance of his obligations. In other words, the first phrase before the conjunction relates to a wider range of professionals than the limited category referred to after such conjunction. The former category includes legal practitioners.

[24] In any event, the objections raised by the first respondent were not only technical in nature but also of legal nature and clearly the respondent had been assisted by legal professionals in formulating such objections. I see no reason why the applicant could not also utilize the services of legal professionals to respond and to deal with such objections. In the result, this ground of objection is rejected.

GROUND 6

[25] This ground relates to the sufficiency of the affidavit provided by the first respondent as evidence in respect of the loan acquired by her. This loan was acquired prior to the granting of the order of the division of the estate. In my view, the affidavit provides sufficient support in this regard and

accordingly this ground of objection is upheld. The parties to the divorce must share not only the assets of the joint estate but the liabilities attached thereto, especially those that were incurred before the division order was granted. Accordingly, this ground of objection is upheld.

GROUND 7

[26] This ground relates to the municipal charges including rates and taxes levied in respect of the property at Emfuleni which is retained by the first respondent. I am in agreement with the applicant that these municipal costs ought to be paid by the person to whom the property was allocated. This is further fortified by the fact that each of the parties are entitled to let such immovable property and receive rental therefrom. It is therefore fallacious to contend that the joint estate should be responsible for those expenses. Accordingly, this ground of objection is rejected.

GROUND 8

[27] This relates to the legal fees incurred by the first respondent in respect of the divorce proceedings. It is true that in terms of the court order referred to above, the costs of the divorce were reserved. - In my view, it is not proper to pre-empt the determination of those costs at the appropriate time

by including them in the consideration of the division of the joint estate at this point in time. Accordingly, this ground of objection is rejected.

AD GROUND 9

[28] This relates to the sale of a Mercedes Benz vehicle by the second respondent without the consent of the first respondent, which sale took place prior to the division order. The applicant contends that the proceeds of the sale were utilized for the benefit of the joint estate since the asset was sold before the division of the estate. The applicant further contends that section 15(9) of the Matrimonial Property Act no. 88 of 1984 entitles the first respondent to sue the second respondent if she is of the view that she was defrauded by such sale without her consent. I disagree.

[29] It is clear from section 15(9)(b) of the Matrimonial Property Act that the sale of the assets of the joint estate without the consent of the other spouse will require an adjustment to be effected in favour of the aggrieved spouse upon the division of the joint estate. In the present case, it is common cause that the second respondent never acquired the consent of the first respondent nor is there sufficient evidence to refute her allegation that the joint estate suffered a loss as a result of that transaction. Accordingly, I am of the view that the adjustment as suggested by the first respondent should be effected accordingly and there is no better or later

opportunity to do so than now. It follows therefore that this ground of objection is upheld.

[30] As to costs, it is clear from my finding above that there is no basis for penalizing the applicant with the costs of the application. Further, my finding in respect of the individual grounds of objection makes it appropriate that the costs of both the main application and the counter application should be paid out of the funds of the joint estate. There was partial success for both the main application and the review application.

[31] In the result, I make the following order:

[31.1] The applicant's amended final account dated 15 October 2020 is hereby reviewed and set aside to the limited extent as expressly recorded in paragraph 31.2 below. Save as set out in paragraph 31.2 below such account is otherwise confirmed;

[31.2] The applicant is ordered to correct such amended final account in the manner as per the draft order to be prepared by the applicant for the court's approval within 5 days of this order.

[31.3] The costs of the main application and the counter application, either as agreed or taxed, shall be borne and paid by the joint estate as a liability against such estate.

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DT SKOSANA

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant:	Adv MP van der Merwe SC
Instructed by:	Jarvis Jacobs Raubenheimer Inc
Counsel for the First Respondent:	Adv DS Hodge
Instructed by:	Steve Merchak Attorney Care of MACINTOSH, CROSS & FARQUHARSON
Date heard:	25 January 2022
Date of Judgment:	31 January 2022