IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 11046/2014

In the matter between:

L A **Applicant**

and

E A **First Respondent**

FRANCES LEPPAN **Second Respondent**

JUDGMENT

09 May 2018

MBATHA J

[1] On 18 April 2018 I made the following order:

'(a) The Second Respondent be and is hereby directed to pay the Applicant, out of funds forming part of the joint estate between the Applicant and the First Respondent, the sum of one million rands (R1 000 000.00).

(b) The Second Respondent shall, upon payment of the said amount one million rands to the Applicant, debit the Applicant's account for the sum of one million rands when preparing her final liquidation and distribution account of the set joint estate.

(c) The First Respondent and the Second Respondent, *de bonis propriis*, are to pay the costs of this application jointly and severally.'

[2] The Applicant and the First Respondent's marriage was dissolved by this court on 14 April 2015. And orders for division of the joint estate and the appointment of a liquidator were made. The powers and functions of the liquidator formed part of the order. The liquidator appointed by the court, Mr Pierre de Villiers Berrangé, was as of 22 May 2015 replaced by Ms Frances Leppan, the Second Respondent herein.

[3] It is common cause that the liquidator was appointed due to the magnitude and complexity of the joint estate.

[4] The nub of the Applicant's case concerns the failure of the Second Respondent to advance to her funds to obtain expert evaluations of the assets of the joint estate. She challenges the correctness of the valuations in respect of various business interests and assets as provided by the Respondents. The Applicant has given a history as to how she has tried to engage with the Second Respondent regarding her concerns, which I do not intend to repeat here. However, it is important to note that when the Applicant did not get satisfaction from the Second Respondent, she indicated to her that she wished to approach the court for the release of a certain amount of funds to get her own expert valuations.

[5] In consideration of this application I have confined myself to the period from when the Applicant intimated to the Second Respondent that she wished to approach the court for the release of the funds. A letter dated 14 July 2017 was addressed by the Applicant's attorneys of record, Nan Naidoo, to the Second

Respondent informing her of their intention to bring an application for the release of funds to the Applicant. This letter elicited a favourable response from the Second Respondent as she replied as follows:

'The writer, in her capacity as receiver of the joint estate, is sympathetic to your client's plight. In this regard we place on record that we have no issue with releasing funds to your client without need for a court order. We simply need you to place yourselves on record formally and furnish us with your trust account details to enable us to comply with the rules of court.' (My emphasis.)

However, on 3 August 2017 she reneged on her undertaking on the basis of an objection raised by the First Respondent, at the same time assured the applicant as follows:

'The writer will seek the advice of senior counsel this morning and will, if need be, approach the court for direction as contemplated in the court order.' (My emphasis.)

This was subsequently followed by the Second Respondent's letter dated 7 August 2017 which stated that she consulted with counsel and a judge in chambers, whereby they were advised that it would be negligent on their part to pay out any funds until such time as the value of the matrimonial estate has been set. She then re-iterated that a set of papers will be served upon the Applicant's attorneys, giving them 20 days' notice to file alternative valuations to challenge the current valuations.

In response to this letter the Applicant's attorneys raised their concerns in their letter dated 24 August 2017, to the Second Respondent consulting with a judge in chambers, in their absence, which conduct they considered to be irregular. They also placed it on record that she was not in a position to get valuations without funds.

[6] The Second Respondent's response in her answering affidavit is that she deemed it a frivolous and luxurious exercise to engage the services of any further valuators / appraisers / accountants. The valuations she had obtained were from professional persons or qualified experts. She denied having relied only on the information obtained from the First Respondent and asserted that she had engaged with the Applicant as well. She had also relied on the entire contents of the files obtained from the Applicant's erstwhile divorce attorneys.

[7] It is my view that the Applicant has raised genuine concerns regarding the estate and she must be afforded an opportunity to obtain such expert assistance. I will only mention one issue which has persuaded this court, that she needs assistance, in this regard. It relates to a sale of a unit in one of the property portfolios, which has been sold for over R997 500, when its valuation by the Second Respondent's experts amounted only to R450 000. The other concern raised is that the First Respondent collects all the rental income from the various property portfolios. The Applicant asserts that the appointment of the requested experts will assist her to get a fair and equitable distribution of the joint estate. It is also common cause that in terms of the divorce order the Applicant was awarded an income of only R4 000 per month and cannot be said to be in a position to pay for valuations and other experts.

[8] This court in an earlier decision in (*Samsudin v De Villiers Berrange NO & others,* unreported case 3995/2004, 19 August 2004), held that the assets of both spouses vests in the trustees and that if the trustees did not release funds to the applicant to pursue her legal challenge, she would be prejudiced. It is apposite to state that this similarly applies to the Applicant, that she be afforded an opportunity to adequately present her case before the Second Respondent. The court in *Samsudin* recognised 'that a claim for a contribution towards costs in a matrimonial suit is *sui generis* and is founded essentially on the duty of support that spouses owe to each other. It is also aimed at putting her in a position where she could adequately put her case before the court.' The Second Respondent has a legal duty to assist the Applicant by providing her with funds to get the valuations, which the Second Respondent demands from her despite her indigent state.

[9] The Second Respondent appears not to appreciate the nature of her duties, in terms of the court order which amongst others include:

'Leave is granted to the liquidator to approach the court (sic), should the need arise, for directions as to how to deal with the joint estate or any particular issue which may arise with regard to such administration, as well as for further or other powers.'

The liquidator occupies a fiduciary position in some respects. He / she must act impartially. There must be no preference, perceived or not, for or against an individual. Therefore the Second Respondent owed a fiduciary duty to both the Applicant and the First Respondent.

She asserts as follows in her answering affidavit:

'As contemplated in the court order I can, in my capacity as liquidator, approach the court. I immediately telephoned the High Court and ascertained that the senior civil judge at that stage was Koen J. I requested an attendance with the relevant judge in chambers in order to seek direction, on an urgent basis. Koen J indicated during my attendance that it would be negligent to release any funds prior to the finalization of the value of the Joint Estate being set.' (My emphasis.)

I have perused the file and the cover thereof, but there is no entry of such a consultation with the judge in chambers. It is also trite that no judge can give advice under the circumstances as stated by the Second Respondent

[10] It is common knowledge that where a liquidator is uncertain as to the course to follow or where the decision will be controversial he or she must approach the court. The Second Respondent's appointment was made to protect the ownership rights of the Applicant and the First Respondent where they cannot agree on division of the joint estate.

[11] The approach which the Second Respondent made to the 'court' as she states, is not the approach meant in the exercise of her duties. 'Court' in the Divorce Act 70 of 1979 is defined as follows:

'Court' means any High Court as contemplated in section 166 of the Constitution of the Republic of South Africa, 1996, or a court for a regional division contemplated in section 29

(1B) of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), which has jurisdiction with respect to a divorce action;'

It does not make reference to the way the Second Respondent approached the judge.

[12] I agree with the Applicant that such approach to a judge is irregular conduct on the part of the Second Respondent. She approached the judge in chambers in her capacity as a liquidator to seek legal advice, without the knowledge of the other party in a manner where the other party had indicated that it wishes to seek redress from a court of law. She deprived the Applicant of her right of access to court in breach of s 34 of the Constitution,[1] which provides as follows:

'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'

It is only a court of law that can give directions upon hearing of an application before it. The Applicant was entitled to a fair hearing. In *Hlophe v Constitutional Court of South Africa & others*,[2] Mojapelo DJP in para 20 stated as follows:

'The foundation of the right to be heard is not only constitutional; it is also anchored, in the common law principle of *audi alteram partem* that recognises as part of the rules of natural justice the right of every person to be consulted or heard before a decision or step is taken that affects or may affect such person.'

[13] The First Respondent's opposition to the application was on the basis that he would suffer severe prejudice if a sum of R1 million is paid to the Applicant. His opposition to the application is malicious as he controls all the income that is generated by the Close Corporation and the personal property portfolio. The Applicant did not even request that the interim payment be borne by the joint estate, but that it be deducted from her half share of the joint estate. There will be no prejudice to an estate which is conservatively estimated to be worth over R22 million.

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[1] The Constitution of the Republic of South Africa, 1996.
[2] [2009] 2 All SA 72 (W); [2008] ZAGPHC 289 (08/22932) (25 September 2008).

[14] The late filing of the notice to abide by the Second Respondent as of 5 March 2018 will not absolve her of the payment of costs in this matter. First, she stopped the Applicant from bringing an application to court to protect her rights, reneges on her undertaking to assist her and failed to approach the court for guidance and directions. Secondly, when the Applicant brings this application she opposes it on grounds which are not sustainable in law. Later on she decides to abide by the decision of the court. It is my view that she could easily have obtained legal opinion on the matter when the First Respondent objected to the request made by the applicant, but failed to do so.

[15] In general, a party who litigates in a representative capacity cannot be ordered to pay costs *de bonis propriis*, unless if he / she had been guilty of improper conduct.[3] However, he / she may be ordered to pay costs if there is a want of *bona fides* on his / her part or if he / she have acted with gross negligence.[4] It is my view that the Respondents have without good cause failed to come to the assistance of the Applicant.

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MBATHA J

[3] *Cooper NO v First National Bank of SA Ltd* 2001 (3) SA 705 (SCA).
[4] *Blou v Lampert and Chipkin, NNO, & others* 1973 (1) SA 1 (A).

Date of hearing:	18 April 2018
Date:	09 May 2018

Appearances

For the Applicant:	G Reddy Instructed by NAN NAIDOO ATTORNEYS & CONVEYANCERS 7 Princess Alice Avenue Glenwood DURBAN
For the First Respondent :	Mr E A (In person) […] PIETERMARITZBURG
For the Second Respondent:	FRANCES LEPPAN c/o LEPPAN ATTORNEYS Second Floor, Gresham House 11 Wembley Terrace Wembley PIETERMARITZBURG