

**IN THE HIGH COURT OF SOUTH AFRICA  
FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable/Not reportable**

Case no: 5010/2024

In the matter between

**PETRUS HERODUS HILLEBRAND  
BADENHORST N.O.**

Applicant

and

**N[...] G[...] C[...]**

1<sup>st</sup> Respondent

**M[...] A[...] C[...]**

2<sup>nd</sup> Respondent

**Neutral citation:** *Petrus Herodus Hillebrand Badenhorst N.O. v N[...] G[...] C[...] and M[...] A[...] C[...]*

**Coram:** Nemavhidi AJ

**Heard:** 14 November 2024

**Delivered:** 27 February 2024

**Summary:** Divorce – marriage in community of property – joint estate realized by a court – appointed Receiver and Liquidator – agreement signed by all three parties – Sections 7(1) and 7(2) of the Divorce Act 70 of 1979.

**ORDER**

1. The applicant has made out a proper case, and the Court grants the orders as prayed for in the notice of motion.

2. The first respondent shall pay costs on scale A of Rule 67.

## JUDGMENT

**Nemavhidi AJ**

### **Background**

[1] The applicant in *casu* is the Court appointed liquidator in the joint estate of the first and second respondents who were married to one another in community of property. The applicant is required, by virtue of his appointment, to realize the assets of the respondents' joint estate. The first respondent has refused to sign the necessary documents to effect transfer of an immovable property, which forms part of the joint estate; the applicant accordingly applies for an order that the first respondent be compelled to sign such documents. The second respondent abides by the Court's discretion.

### **The applicant's appointment, function and powers**

[2] On 21 February 2023, this Court granted a decree of divorce and ordered that a receiver and liquidator, agreed to between the parties, will be appointed within 60 days from the date of this order. However, the respondents were unable to agree on the identity of the receiver to be appointed and under para 4 of the court order, the Legal Practice Council identified the applicant as the receiver (Receiver) who was to be appointed to divide the respondents' joint estate.

[3] Both respondents entered into a Receiver and Liquidator Agreement with the applicant in terms of which the applicant's function and powers were agreed to. These powers include *inter alia*:

- (i) The applicant is to divide the joint estate or realize the whole joint estate's assets, movable and immovable, and for that purpose to sell it or any part of it, by public auction or by private agreement as may seem most beneficial with the leave of both parties;
- (ii) to bid, collect the debts due to the joint estate, unless the same be dispersed of by sale;

(iii) to pay the liabilities of the joint estate;

(iv) to prepare a final account between the applicant and the respondent and divide the assets of the joint estate after payment of its liabilities in accordance with the account.

[4] The Receiver is empowered to distribute and allocate the movable assets of the joint estate between the Respondents and will not be obliged to realize or sell all assets of the joint estate. Furthermore, the Receiver is obliged to collect all assets, discharge all liabilities and pay to the parties after deduction of his fees and disbursements, and pay such amounts to the respective parties and any other amounts due, the residue of the joint estate to each party in equal shares.

[5] The parties shall attend to the signing of all the documents on request in order to give effect to any of the provisions of this agreement and any requests of the Receiver.

[6] In *Gillingham v Gillingham*<sup>1</sup> (*Gillingham*) the Court stated:

'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 some one (whether he is called liquidator, receiver, or curator --- perhaps curator is the better word) to collect, realise, and divide the estate.'<sup>2</sup>

[7] It is important to bear in mind that a liquidator's final account, as alluded to in the excerpt above, has no final effect and legal force unless enacted in an order of Court.<sup>3</sup>

[8] In *Matolo-Dlapu N.O. v NM*,<sup>4</sup> the court held:

'In short the Receiver and Liquidator will step into the shoes of the parties and

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<sup>1</sup> *Gillingham v Gillingham* 1904 TS 609 (T).

<sup>2</sup> *Ibid* at 613

<sup>3</sup> *SSM v PJ N.O. and Another* [2023] ZAGPPHC 2024 paras 18 and 46.

<sup>4</sup> *Matolo-Dlepu N.O. v NM* [2021] ZAGPJHC 805.

effectively have the power to amass all their financial information. A Receiver and Liquidator is an officer of the court, who is vested with authority to deal with the assets of the joint estate under the direction of the court. Upon realizing the accrual, the Receiver and Liquidator has the powers to distribute the accrual between the parties by way of either selling all the properties to obtain funds or by way of distribution of the property. The Receiver and Liquidator has ultimate powers and has the final say on how to divide the assets or the accrual, although the final report of the Receiver and Liquidator might be taken for review on circumstances where the Receiver and Liquidator acted *mala fide* or did not act in the party's interest.<sup>5</sup>

[9] The Receiver is entitled in law to exercise a discretion regarding the manner in which assets which form part of the joint estate are dealt with. In circumstances where a receiver is being frustrated in the exercise of his duties, he enjoys the necessary *locus standi* to approach the court which appointed him to obtain directions or other relief regarding the exercise of his power.<sup>6</sup>

[10] The applicant advised the first respondent that the second respondent was desirous to purchase her half-share in the property known as 48 William Plaatjie, Heidedal, Bloemfontein (the property). The first respondent refused to partake in any negotiations, stating that no agreement could be reached between her and the second respondent regarding the division of the joint estate. She suggested that all assets in the joint estate should be sold and the proceeds divided between them. Later, the first respondent insisted that property located at Turflaagte be awarded to her in the division of the joint estate. The property does not form part of the joint estate and could not be awarded to the first respondent in the distribution of assets.

[11] The first respondent obtained a valuation for the property which amounted to R740 000.00. The second respondent offered to purchase the first respondent's half share of the property for 50% of the valuation. However, the first respondent refused.

[12] The applicant approached her several times and she refused to sign documentation required to proceed with the sale and transfer of the first respondent's undivided half share in the property to the second respondent.

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<sup>5</sup> Ibid paras 21-22.

<sup>6</sup> *Coetzer v Coetzer* 1955 (1) PH BI (O).

[13] The first respondent has raised spurious grounds of opposition in this application alleging that the properties should be sold and proceeds thereof be distributed in equal shares between them. However, she maintains that she does not want to sell her undivided half of the property to the second respondent.

[14] If the applicant were to accede to the first respondent's demands, the joint estate would be burdened with avoidable additional expenses as the first respondent's half share in the property is sold at market value to the second respondent. The first respondent has not offered to purchase the second respondent's undivided half-share of the property and she contends that she cannot be compelled to sell her half-share to the second respondent.

[15] In *Fischer v Ubomi Ushishi Trading and Others*<sup>7</sup> the Supreme Court of Appeal identified the rights acquired under the divorce order and/or the order for the division of the joint estate and held that 'Properly understood, this was a personal right against Mr Haynes to compel transfer of his half share in the property into her name.'<sup>8</sup>

[16] What is required by a spouse upon the dissolution of a marriage in community of property, unless the Court grants a forfeiture order, is thus only a personal right to claim transfer of half of the value of the joint estate and alternatively, in the case of immovable property, the right to claim transfer of half of such property. The respondents in *casu* have no interest in future co-ownership of the property.

### **Argument raised by the first respondent**

[17] The first respondent alleges that she had initially accepted a proposal inviting her to sell her half share of the property to the second respondent on condition that he sells her his half share of the Turflaagte property to her. However, when the first respondent learnt that the Turflaagte property was no longer forming part of the joint estate, she proposed to the Receiver that everything in the joint estate be sold by public auction and the proceeds thereof be distributed evenly between them. She reached this decision because she is of the view that the liquidator is bullying her because she is a woman. In addition, she maintains that she has no legal obligation

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<sup>7</sup> *Fischer v Ubomi Ushishi Trading and Others* [2018] ZASCA 154; 2019 (2) SA 117 (SCA).

<sup>8</sup> *Ibid* para 30.

to sell her half-share to the second respondent.

[18] In response, the first respondent states that if the second respondent wanted to purchase her half share, he should have made this application out of her own accord.

### **Court ruling**

[19] Sections 17(1) and (2) of the Divorce Act 70 of 1979 states that a Court which grants a decree of divorce may, either per a written agreement entered by the parties, or *mero motu* in the absence of such an agreement, make any order regarding the division of the assets of the parties. In terms of *Gillingham*, the Court has the common law power to appoint a receiver or liquidator to realise and divide the assets of the joint estate on the Court's behalf.

[20] The respondents entered into a Receiver and Liquidator Agreement with the applicant in terms of which the applicant's function and powers were identified and agreed to. Those powers are referred to in paragraph 3 above.

[21] What is acquired by a spouse upon the dissolution of the marriage in community of property, unless the court grants a forfeiture order, is a personal right to claim a transfer of half of the value of the joint estate, in the case of an immovable property, the right to claim transfer of half of such property. Since both respondents have no interest in future co-ownership of the property, it will be fair that any of the parties may offer to purchase the undivided half share of the other spouse. The first respondent has no right to dictate to the Receiver to whom her half-share ought to be sold.

[22] In the result, the following order is made:

1. The applicant has made out a proper case and the Court grants the orders as prayed for in the notice of motion.
2. The first respondent to pay costs on Scale A of Rule 67.

**Appearances**

For the Appellant:  
Instructed by:

Adv R van der Merwe  
Badenhorst Attorneys  
Bloemfontein

For the The first respondent:  
Instructed by:

Adv N Nyezi  
Rampai Attorneys  
Bloemfontein