IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 82156/14

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

[20 November 2017]

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In the matter between:

M (BORN K), K Applicant

And

M, T Respondent

Coram: Thompson AJ

Date of Hearing: 31 October 2017

Date of Judgment: 20 November 2017

Summary: Adjustment in terms of Section 15(9)(b) of the Matrimonial Property Act 88 of 1989 must be pleaded and ventilated in the pleadings during a divorce. Adjustment affected by the receiver and liquidator during modus of dividing joint estate, but adjust must be ordered by the Court at the time of granting the decree of divorce.

Principles regarding powers to be granted by the court to a receiver and liquidator restated.

JUDGMENT

THOMPSON AJ:

[1] The Applicant and the Respondent are former spouses. The parties' in community of property marital union was dissolved by way of an order by the Honourable Judge Preller, the relevant portion thereof which reads as follows:

> 'Having heard the plaintiff/counsel for the plaintiff and having read the documents filed of record
>
> IT IS ORDERED THAT
>
> 1. THAT the bonds of marriage subsisting between the plaintiff and defendant be and hereby are dissolved.
>
> 2. THAT the joint estate be divided.
>
> . . . .'

The applicant was the defendant and the respondent was the plaintiff in the divorce action. The divorce action was undefended.

[2] Notwithstanding the fact that the decree of divorce had been granted some two years and ten months ago, effect has not yet been given to the order whereby the joint marital estate was divided between the parties. As a result the applicant launched an application for the appointment of a receiver and liquidator in order to

attend to the effecting of the division of the joint estate order. The respondent opposed the application, not so much on whether a receiver and liquidator should be appointed but rather what powers the receiver and liquidator should be cloaked with.

[3] By the time the application was argued before me, much had become common cause between the parties with the outstanding issues of dispute being the following:

[3.1] Whether Advocate Alan Jordaan, as suggested by the applicant, should be appointed as receiver and liquidator or whether the chairman of the South African Institute of Chartered Accountants, in the absence of agreement between the parties, should appoint the receiver and liquidator as suggested by the respondent.

[3.2] Whether the receiver and liquidator should be cloaked with the power to sell assets of the joint estate and whether he should further be empowered to collect the debts of the joint estate.

[3.3] Whether the receiver and liquidator should be cloaked with the power of a trustee in terms of the provisions of the Insolvency Act[1].

[3.4] Whether the receiver and liquidator must be cloaked with the power to locate assets of the joint estate outside of the Republic of South Africa, to proceed overseas to take evidence on commission de bene esse, and, if needs be, to take control/possession of such assets of the joint estate and deal with them in accordance with his powers.

[3.5] Whether the costs of the divorce action should be paid from the proceeds of the joint estate.

[3.6] Whether the receiver and liquidator should be cloaked with the power to effect an adjustment in favour of either party in terms of Section 15(9) of the Matrimonial Property Act[2] ('the MPA').

[3.7] Whether the parties should be able to refer objections relating to a provisional liquidation and distribution account to a retired judge for determination.

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[1] Act 24 of 1936.
[2] Act 88 of 1989.

[3.8] Whether, in relation to the delivery of a final account, the receiver and liquidator should refer any disputes regarding objects to a retired judge for determination.

[4] In addition to the aforesaid, the respondent launched a counter-application whereby the respondent sought relief that the receiver and liquidator investigate and determine payments made by the respondent to and on behalf of the applicant from the date of the divorce and that the amount so paid and determined be deducted from the applicant's share of the joint estate.

[5] During the hearing of the matter the issues were further narrowed.

[5.1] In relation to the issues of selling assets and collecting debts, Ms Rosenberg SC, appearing for the respondent, indicated that the objection to the receiver and liquidator collecting the debts of the joint estate was an error and no objection is raised in this regard.

Mr Faber SC, appearing for the applicant, contended that the proposed draft order makes provision therefore that the parties may bid on assets to be sold, however I did not understand him to have any grave difficulty if the order contains a provision that prior to offering any assets for sale to third parties, that the receiver and liquidator must first offer such asset/s to the parties for purchasing. This, in my view, is dealt with the objection in paragraph 3.2 of this judgment.

[5.2] Mr Faber SC readily conceded that in terms of the judgment by the Supreme Court of Appeal in the matter of *Morar NO v Akoo and Another*[3] that the applicant cannot persist with the relief sought to cloak the receiver and liquidator with the powers of a trustee in terms of the Insolvency Act. My attention was directed towards *GN v JN*[4] wherein the Supreme Court of Appeal granted a receiver and liquidator those very powers. However, as Mr Faber SC correctly pointed out, in the GN-matter there is no reference to the *Morar* judgment. To this I would add that the *GN* matter dealt with the interpretation of s 7(7) and (8) of the Divorce Act[5]. The issue of what powers a receiver and liquidator should be cloaked with was not

[3] 2011 (6) SA 311 (SCA).
[4] 2017 (1) SA 342 (SCA).
[5] Act 70 of 1979.

argued or even dealt with in the *GN* judgment. This effectively disposes of the issue in para 3.3 of this judgment.

[5.3] I do not intend to deal at length with the various arguments raised for or against the locating of overseas assets. In essence the respondent denied that there are assets abroad that are joint estate assets and, having regard to the dearth of allegations in this regard by the applicant in her founding affidavit, the *Plascon-Evans*-rule should apply. As a fall back the respondent tendered that the receiver and liquidator may be cloaked with this power, subject to the proviso that the investigations relating thereto should be for the applicant's account, save in the event that the receiver and liquidator locates assets abroad, in which event the costs of the investigations are to be for each party's account, equally.

This, the applicant understood to mean that she should pay the costs of the investigation for assets located abroad upfront. I did not understand the respondent's tender to mean such. I understood it to mean that when the receiver and liquidator finalises his liquidation and distribution account, the costs of the investigations abroad should be allocated solely to the applicant, subject to the proviso as set out by the respondent. After Ms Rosenberg SC indicated that my understanding was correct and after I clarified that the respondent's proviso would take effect upon 'any asset of any value' being located abroad belonging to the joint estate, I understood the applicant to have no objection thereto. In my view this disposed of the objection in para 3.4 of this judgment.

[5.4] It was conceded on behalf of the applicant that the legal costs relating to the divorce action should not form part of the division of the joint estate. This effectively disposed of the objection in para 3.5 of this judgment.

[6] The only issues that remained for determination were therefore the identity of the appointment of the receiver and liquidator, the MPA adjustment issue and whether any objections should be referred to a retired judge for determination.

IDENTITY OF THE RECEIVER AND LIQUIDATOR

[7] The applicant suggested the appointment of Mr Jordaan. Mr Jordaan gave his written consent to act as receiver and liquidator in the matter. He is an admitted advocate of the High Court and practiced as such for a period of 19 years as the

Pretoria Society of Advocates between 1973 and 1992. For the period of 1992 to 1998 Mr Jordaan was involved with South African Cricket on a fulltime basis. It was during the latter part of this tenure that he enrolled at the Master's office and, for the last 17 years, has been engaged in only divorce liquidations. Mr Jordaan is undoubtedly an expert in his field.

[8] The respondent objected to the appointment of Mr Jordaan on the basis that he does not know Mr Jordaan. During argument, Ms Rosenberg SC submitted that within the matrimonial litigation community the incidence of experts who will pander towards the interests of the party instructing such expert is well known. My difficulty with this argument, as appreciated by Ms Rosenberg SC, is that this may be found within a specific field dealing with a specific portion of matrimonial litigation where value judgments based on matters that are not an exact science is under consideration. In casu, Mr Jordaan will have to account for his liquidation and distribution of the joint estate, duly supported by vouchers.

[9] It was submitted on behalf of the applicant that it is the duty of the court to appoint an impartial person who is to effect the division[6]. This means, so the submission goes, that the court must appoint a specifically identified person. I can find nothing in the authorities that I have been referred to in support of this submission. As I understand the authorities the court must appoint an impartial person. Where the parties cannot agree to the identity of a receiver and liquidator and where valid objections are raised to the persons suggested by the parties, the submission on behalf of the applicant will have it that the court must now embark on a process to find an impartial person. The immediate question that arises is who will attend to obtaining the necessary consent to act. Surely that cannot be the function of a judicial officer. In appropriate circumstances I see no good reason why the Court cannot order the appointment of an impartial person the identify of which is to be determined by someone such as the chairperson of the South African Institute of Charted Accountants. This, I understand, to be the practice in this division in order to avoid allegations of bias during the course of effecting the division of the joint estate.

[6] *Revill v Revill* 1969 (1) SA 325 (C) at 327

[10] This matter is, however, not an appropriate matter to exercise my discretion where a third party should be requested to identify the impartial person. No concerns have been raised on the papers by the respondent regarding the qualifications, competence or impartiality of Mr Jordaan. I see no reasons that vitiate against the appointment of Mr Jordaan as receiver and liquidator to affect the division of the joint estate of the parties

ADJUSTMENT OF THE ESTATE IN TERMS OF SECTION 15(9)(b) OF THE MPA

[11] The applicant's case in this regard, made out for the first time in her replying affidavit, is two-fold. Firstly, she alleges that during December 2014, whilst the parties were still married, the respondent purchased a residence in Hyde Park for his alleged ex-girlfriend. To this end the applicant alleges that the alleged ex-girlfriend of the respondent tremendously benefitted from the joint estate. Secondly, the applicant alleges that the respondent has, subsequent to the date of the granting of the decree of divorce, dissipated the assets of the joint estate by acquiring certain assets, both movable and immovable, for his current wife. The respondent also, so the allegation goes, paid for a 3 day wedding at Sun City, with all expenses thereto covered by the respondent. The respondent submitted that the applicant is not entitled to this relief. According to the respondent the joint estate, as at the date of the divorce, falls to be divided. Incidentally, this is the very case that is made out by the applicant in her founding affidavit. It bears mentioning that there is no attempt by the applicant, in her founding affidavit, to substantiate a case for the adjustment that is loosely contended for in the replying affidavit.

[12] The applicant does not specifically rely on s 15(9) of the MPA in either her founding affidavit or replying affidavit. The applicant also does not formulate her case in a clear manner so as to indicate that she is relying on the relevant provisions of the MPA. This point is also not addressed with any fervour in the applicant's heads of argument[7]. On this basis alone the applicant should fail on this point[8] and I should deny the relief sought in this regard. However, as the respondent did not

[7] See generally *Yannakou v Appollo Club* 1974 (1) SA 614 (A) at 623G.
[8] *Bayat and Others v Hansa and Another* 1955 (3) SA 547 (A) at 553D – E*; Betlane v Shelly Court CC* 2011 (1) SA 388 (CC) para 29.

take the point that he was prejudiced in the conduct of his case in this regard I will deal with this issue.

[13] Subject to what follows, during the course of the hearing this point was debated at some length. However, save for being referred to s 15(9) of the MPA and a loose reference to the now locus classicus of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[9] regarding the interpretation of s 15(9)(b) of the MPA, my attention was not directed to any authority on the point. During the course of preparing this judgment I came upon the judgment of Prinsloo J in *Pelser N.O. and Another v Lessing N.O. and Others*[10] . Quite fortuitously, the applicant's counsel submitted additional heads of argument, subsequent to my reading of the *Pelser* judgment, on the *Pelser* judmgent. The respondent's counsel submitted subsequent heads of argument to deal with the applicant's supplementary heads of argument.

[13] Although this matter ultimately turns on an interpretation of s 15(9)(b) of the MPA, the appropriate point of departure will be to have regard to s 15 of the MPA generally. Section 15 of the MPA provides as follows:

> '15 Powers of spouses
>
> (1) Subject to the provisions of subsections (2), (3) and (7), a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other spouse.
>
> (2) Such a spouse shall not without the written consent of the other spouse-
>
> (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
>
> (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;
>
> (c) alienate, cede or pledge any shares, stock, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;

[9] 2012 (4) SA 593 (SCA).
[10] (5034/2013) [2014] ZAGPPHC 521 (25 July 2014).

(d) alienate or pledge any jewellery, coins, stamps, paintings or any other assets forming part of the joint estate and held mainly as investments;

(e) withdraw money held in the name of the other spouse in any account in a banking institution, a building society or the Post Office Savings Bank of the Republic of South Africa;

(f) enter, as a consumer, into a credit agreement to which the provisions of the National Credit Act, 2005 (Act 34 of 2005) apply, as 'consumer' and 'credit agreement' are respectively defined in that Act, but this paragraph does not require the written consent of a spouse before incurring each successive charge under a credit facility, as defined in that Act;

[Para. (f) substituted by s. 172 (2) of Act 34 of 2005 (wef 1 June 2006).]

(g) as a purchaser enter into a contract as defined in the Alienation of Land Act, 1981 (Act 68 of 1981), and to which the provisions of that Act apply;

(h) bind himself as surety.

(3) A spouse shall not without the consent of the other spouse-

(a) alienate, pledge or otherwise burden any furniture or other effects of the common household forming part of the joint estate;

(b) receive any money due or accruing to that other spouse or the joint estate by way of-

(i) remuneration, earnings, bonus, allowance, royalty, pension or gratuity, by virtue of his profession, trade, business, or services rendered by him;

(ii) damages for loss of income contemplated in subparagraph (i);

(iii) inheritance, legacy, donation, bursary or prize left, bequeathed, made or awarded to the other spouse;

(iv) income derived from the separate property of the other spouse;

(v) dividends or interest on or the proceeds of shares or investments in the name of the other spouse;

(vi) the proceeds of any insurance policy or annuity in favour of the other spouse;

(c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding an asset of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate, and which is not contrary to the provisions of subsection (2) or paragraph (a) of this subsection.

(4) The consent required for the purposes of paragraphs (b) to (g) of subsection (2), and subsection (3) may, except where it is required for the registration of a deed in a deeds registry, also be given by way of ratification within a reasonable time after the act concerned.

(5) The consent required for the performance of the acts contemplated in paragraphs (a), (b), (f), (g) and (h) of subsection (2) shall be given separately in respect of each act and shall be attested by two competent witnesses.

(6) The provisions of paragraphs (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business.

(7) Notwithstanding the provisions of subsection (2) (c), a spouse may without the consent of the other spouse-

(a) sell listed securities on the stock exchange and cede or pledge listed securities in order to buy listed securities;

(b) alienate, cede or pledge-

(i) a deposit held in his name at a building society or banking

institution;

(ii) building society shares registered in his name.

(8) In determining whether a donation or alienation contemplated in subsection (3) (c) does not or probably will not unreasonably prejudice the interest of the other spouse in the joint estate, the court shall have regard to the value of the property donated or alienated, the reason for the donation or alienation, the financial and social standing of the spouses, their standard of living and any other factor which in the opinion of the court should be taken into account.

(9) When a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under section 16 (2), and-

(a) that person does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be;

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of the said subsection (2) or (3), or that the power concerned has been suspended, as the case may be, and the joint estate suffers a loss as a result of that transaction, an adjustment shall be effected in favour of the other spouse upon the division of the joint estate.'

[14] Section 15 of the MPA is found under Chapter III of the MPA, headed 'Marriages in Community of Property'. It is trite that '[w]ords in a statute must be read in their entire context and must be given their ordinary grammatical meaning harmoniously with the purpose of the statute. The actual words used by the Legislature are important. Judicial officers should resist the temptation

'to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation'[11].

[15] Subsection (1) of s 15 of the MPA, provides that

'a spouse in a marriage in community of property may perform any juristic act with regard to the joint estate without the consent of the other.'

A 'spouse' is undefined in the act and the ordinary meaning accorded to the word spouse should be applied. A spouse is either member of a married pair in relation to the other[12]. In turn, 'joint estate' is defined in s 1 of the MPA as 'the joint estate of a husband and a wife married in community of property.' A joint estate, in terms of the MPA, thus exists between spouses whilst the marriage, subject to the property

[11] *Liesching and Others v S and Another* (CCT245/15) [2016] ZACC 41; 2017 (4) BCLR 454 (CC) para 30 and the authorities cited therein.

[12] http://www.dictionary.com/browse/spouse
See also https://www.collinsdictionary.com/dictionary/english/spouse where 'spouse' is defined as 'Someone's spouse is the person they are married to.'
See also https://www.merriam-webster.com/dictionary/spouse where 'spouse' is defined as a 'married person'.

regime of community of property, subsists. I agree with Ms Rosenberg SC's submission that s 15 of the MPA generally operates stante matrimonio.

[16] I can see no reason why s 15(9)(b) of the MPA should be treated any differently. The provisions of s 15 of the MPA must be read in their entire context within the purpose of Chapter III, dealing specifically with marriages in community of property, of the MPA. My view that s 15 of the MPA, in toto, deals with the situation stante matrimonio, is fortified if regard is had to s 15(1) in conjunction of s 15(9)(b) of the MPA where reference is made in both subsections to, inter alia, subs (2) and (3).

[17] Being of the view that s 15 of the MPA deals with the situation stante matrimonio, I now turn to deal with s 15(9)(b) of the MPA as relied upon by the applicant during argument before me. Section 15(9)(b) of the MPA allows for an adjustment to be effected upon the division of the joint estate where a spouse commits an act or acts contrary to subs 15(2) or (3) of the MPA and the joint estate suffers a loss as a result of that transaction. The applicant submits that the words 'an adjustment shall be effected. . .upon the division of the joint estate' means that the adjustment must be made at the time that the joint estate is actually divided by the receiver and liquidator. The respondent submits that the court, upon the granting of a decree of divorce, only ordered a division of the joint estate and nothing more. Accordingly, the receiver and liquidator cannot make any adjustment as contemplated by s 15(9)(b) of the MPA.

[18] Upon first blush I was of the view that a judicial exposition of the meaning of 'division of the joint estate' as it appears in s 15(9)(b) of the MPA is necessary in relation to the common law understanding of the termination of the community of property. No doubt it would have been an interesting and intricate exposition as, with my initial research into the issue, there is no clear nor easy answer. However, upon reflection this is not necessary. Firstly, the court has a wide discretion to appoint a receiver and liquidator[13]. However, the court does not have a discretion to grant wide-ranging powers to a receiver and liquidator. Section 15(9)(b) of the MPA requires, in order to impugn a transaction, a finding on whether a spouse knew or reasonably ought to have known that he will probably not obtain the necessary consent. Reasonableness and probabilities are both legal terminologies and will

[13] *Morar,* supra para 16.

require judicial scrutiny and pronouncement based on pleaded facts and evidence led. Secondly, s 15(9)(b) has a further jurisdictional aspect to it, namely the estate must have suffered a loss. This will also require the pleading of facts in relation thereto and the leading of evidence to prove the loss. Surely the receiver and liquidator cannot be expected to receive evidence on this issue and make a finding of fact on a balance of probabilities. The first difficulty that I foresee in this regard is that the respondent's complaint against the appointment of a receiver and liquidator selected by the applicant may then not be completely without merit. The second difficulty that I foresee is much in line with the difficulties enunciated by Wallis JA in the *Morar* judgment[14]. Thirdly, and peculiar to this application, the applicant is wholly silent on whether the joint estate suffered a loss. The applicant alleges that the respondent's alleged ex-girlfriend benefitted from the joint estate. This is, however, not the test. The test is whether the joint-estate suffered a loss.

[19] It is the duty of the receiver and liquidator to receive the assets and liabilities of the joint estate, liquidate same and distribute the free residue to the parties. What the receiver and liquidator, in such circumstances do, is to attend to the modus of giving effect to the court order of division of the joint estate. The receiver and liquidator must make the adjustment when he attends to the modus of dividing the joint estate, but he cannot decide on whether such an adjustment must be made or not. The latter is a triable issue and therefore the decision in relation thereto is a judicial function. In my view, whether a party is entitled to an adjustment in terms of s 15(9)(b) of the MPA must be properly ventilated in the pleadings and in evidence so that the court may pronounce thereon[15]. It is for the court to order the adjustment and the receiver and liquidator to do nothing more than give effect to that order when he attends to the modus of dividing the joint estate.

[20] The above is, however, not the end of the matter. The applicant also seeks an adjustment in relation to events that took place subsequent to the granting of the decree of divorce. The applicant again placed reliance on s 15(9)(b) of the MPA. In this regard the applicant's reliance on the aforesaid section is misplaced. On the applicant's own version the complaints that she raised occurred subsequent to the

[14] See para 23.

[15] See Niekerk Practical Guide to Patrimonial Litigation in Divorce Actions [2015] Issue 17 at para 3.3.3 and Appendix 3D thereto.

decree of divorce being granted. It recently became settled law that the date upon which the value of the joint estate is to be determined is the date of the divorce[16]. It follows then that the joint estate can only suffer loss prior to or on the date on which the value of the joint estate is determined. In addition, I have earlier in this judgment already held that s 15(9)(b) of the MPA deals with transactions stante matrimonio that may be impugned as provided for in terms of s 15 of the MPA. There can therefore not be an adjustment post-divorce.

[21] On a proper reading of the relief that the applicant seeks relating to the complaints post the granting of a decree of divorce, an adjustment is in any event not what the applicant seeks. What the applicant seeks, simply put, is an arithmetical and accounting exercise to be undertaken. If the respondent had dissipated any assets, whether it be cash, investments, movables, immovables or any other asset of the joint estate, after the date of divorce that, as at the date of divorce, formed part of the former joint estate then the respondent had merely collected an asset of the joint estate. I need not deal with the correctness of such conduct as no dissipation has been shown by the applicant, presumably on the thinking that the dissipation will have to be proven to the receiver and liquidator. However, the net effect of such action by the respondent, if same did occur, would be that the receiver and liquidator would have to subtract half of the value of such asset from the distribution to the respondent and add half of the value of such asset to the distribution to the applicant. This is so as the receiver and liquidator will have to make no finding of fact. If the asset formed part of the joint estate at the time of the divorce, a value must be attributed thereto. If the respondent had dissipated same then he had already received the full value thereof and not only his half-share value. As the respondent had already received his half-share that he was entitled to, he is not entitled to receive it again. The applicant is, however, entitled to receive her half-share value that the respondent had appropriated as his own. There is no need for any adjudication as to whether the joint estate suffered a loss. If the asset dissipated subsequent to the granting of the decree of divorce formed part of the joint estate as at the date of divorce, the applicant is entitled to have shared in the value thereof. Nothing more than an arithmetical and accounting calculation needs to be done in order to determine this. This applies vice versa to the respondent. If either party has

[16] *Brookstein v Brookstein* 2016 (5) SA 210 (SCA) at para 15 to 21

an objection as to the manner in which the receiver and liquidator applies the above, they can always approach the court to deal with such objection.

SHOULD OBJECTIONS BE REFERRED TO A RETIRED JUDGE FOR DETERMINATION

[22] The respondent, undoubtedly to ensure an expeditious finalisation of any dispute that arises from the receiver and liquidator's liquidation and distribution account seeks an order that any dispute regarding the liquidation and distribution account be referred to a retired judge for consideration. The applicant opposes this relief sought by the respondent on the basis that referral of a dispute to a retired judge for determination is akin to arbitration, in terms of the Arbitration Act[17] ('the Arbitration Act'). In addition, the applicant submits that a referral to arbitration must be by agreement and cannot be imposed by the court in the absence of an agreement. Lastly the applicant submits that the court cannot abdicate its responsibilities to a third party unless authorised to do so by law.

[23] As I am of the view that the applicant is correct that a referral to arbitration must be by agreement, I need not deal with whether disputes in relation to the liquidation and distribution account will qualify as 'any matrimonial cause or any matter incidental to such cause'[18].

[24] Even if I am wrong in the afore-going, to refer any disputes in relation to the liquidation and distribution account to a retired judge for determination would require that I exercise my discretion in this regard judicially. No case is made out by the respondent why the court should not deal with any objections to the liquidation and distribution account. No case is made out by the respondent why a retired judge would be a more favourable option to determine a dispute rather than the court. I am not inclined to exercise my discretion in this regard in favour of the respondent.

THE RESPONDENT'S COUNTER-APPLICATION

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[17] Act 42 of 1956.

[18] See, however, *Brookstein*, supra.

[25] This leaves the respondent's counter-application whereby the respondent seeks that the receiver and liquidator may investigate and determine the nature of payments made by the respondent to the applicant after the decree of divorce was granted. The applicant submitted that a dispute of fact exists in relation to this issue that cannot be resolved on the papers and that the counter-application should be dismissed with costs. The respondent conceded that a dispute of fact existed but submitted additionally that the costs of the counter-application should be costs in the division of the joint estate. This submission by the respondent is partly based on the life-line the applicant extended in its proposed draft order regarding this issue as follows:

> 'To adjust his distribution by taking into the reckoning such payments as he determines were made by the respondent to the applicant on account of her share of the joint estate.'

[26] As much as this is a life-line by the applicant to the respondent in relation to the respondent's counter-application, I have grave difficulty and serious doubts as to the correctness of cloaking the receiver and liquidator with the power to determine whether payments by the respondent to the applicant was made on account of her share of the joint estate. It is already common cause that a factual dispute in this regard exists. The same relevant considerations, mutatis mutandis, as mentioned in para 18 of this judgment applies.

[27] This does not mean that the receiver and liquidator cannot deal with the payments the respondent contends has already been made to the applicant in lieu of her share of the joint estate. If the parties agree that a payment had been made in lieu of the applicant's share in the joint estate he can naturally account for such payment in this final liquidation and distribution account. If the parties do not agree that a payment has been made in lieu of the applicant's share in the joint estate, the receiver and liquidator may approach the court for a determination.

[28] The applicant submitted that in light of the concession by the respondent and the factual dispute, that the respondent should pay the costs of the counter-application. Although the applicant submits that a factual dispute exists regarding payments made by the respondent to the applicant, the applicant did concede that there were payments made by the respondent to the applicant that should be taken

into account in calculating the division of the joint estate. This concession, however, does not avail the respondent. In my view, para 2.8[19] of the applicant's notice of motion sufficiently catered for the very position the respondent sought to protect in the counter-application. The counter-application was not only unnecessary, it sought to provide wide-ranging powers to the liquidator, the very issue the respondent took issue with on parts of the applicant's application.

[29] In the circumstances I make the following order:

1.

1.1 Mr Alan Jordaan, a duly admitted advocate of this Court, is appointed as the receiver and liquidator for the joint estate of the parties, for the purposes of giving effect to the order by the Honourable Mr Justice Preller whereby the division of the joint estate of the parties was ordered, with the effective date of determination of the value of the joint estate being 22 January 2015;

1.2 The receiver and liquidator shall not be required to lodge security for his administration of the joint estate.

2. The receiver and liquidator shall have the following powers -

2.1 To make all investigations necessary and in particular to obtain all necessary information from the parties, from bank managers, and the managers of building societies and other financial institutions in relation to monies of the joint estate which may have been invested, in accounts under their control.

2.2 To obtain information from the auditors of private companies, the business and personal accountants of both parties and such other persons with the necessary knowledge in relation to their personal affairs and tax matters.

[19] 'the Liquidator shall afford both parties personally the opportunity to make such representations to him about any matter relevant to his duties. . .2.8.1 give due consideration to the representation of the parties and to make such decisions in respect thereof as he may deem fit. . . '

2.3 To call for and obtain balance sheets and other financial statements of all companies and businesses in which the parties held an interest.

2.4 To inspect books of account relating to any company or business in which the parties held an interest.

2.5 To inspect personal bank statements, paid cheques, deposit books and personal statements relating to the affairs and liabilities of the parties compiled for tax and other purposes.

2.6 To physically inspect the assets of the joint estate and to make the necessary inventories thereof.

2.7 To question the parties and to obtain all explanations which the receiver and liquidator may consider necessary for the purposes of making the division.

2.8 To locate assets of the joint estate outside of the Republic of South Africa, to proceed abroad to take evidence on commission, de bene esse, for the purposes of locating such assets and, to the extent necessary, to take control and possession thereof, provided that:

2.8.1 should the receiver and liquidator, in his discretion or at the insistence of the applicant incur any costs in relation to the location of assets abroad and/or to proceed abroad for the purposes of dealing with such assets as contemplated in this order, and locate no assets that formed part of the joint estate as at the date of the divorce, the costs pertaining to such investigation and the like shall be paid solely by the applicant from the applicant's half-share of the joint estate;

2.8.2 should the receiver and liquidator, in his discretion or at the insistence of the applicant incur any costs in relation to the location of assets abroad and/or to proceed abroad for the purposes of dealing with such assets as contemplated in this order, and locate any asset of any value that formed part of the joint estate as at the date of the divorce, the costs pertaining to

such investigation and the like shall be paid jointly and in equal shares by the parties from their respective half-shares in the joint estate .

2.9 To deal with any pension interest or accrued / deferred pension benefits which has accrued or been deferred by any party, and in particular to allocate a portion of one party's pension interest, not exceeding 50% thereof, to the other party as envisaged by s 7(7) and 7(8) of the Divorce Act, 1979, and to cause the appropriate endorsement to be effected to the pension records of such party's pension fund.

2.10 To sell the assets, both movable and immovable, or any part thereof, by public auction or by private agreement as may seem most beneficial, with leave to both parties in the event of a sale by public auction to bid thereat, or, as opposed thereto, to award any such assets to the parties by the distribution thereof in specie, subject to such cash adjustments as the circumstances may render necessary, provided that should the receiver and liquidator wish to sell any asset, he will first offer same, in writing, to the parties for purchase which offer shall be open for 5 (FIVE) days. In the event that either of the parties wish to purchase such asset, the necessary cash adjustment as the circumstances may render necessary must be made. If a cash adjustment cannot be made in the circumstances where a party elected to purchase an asset, the purchase price must either be paid in cash or secured by a final and unequivocal guarantee from a registered financial institution within 14 (FOURTEEN) days of the election to purchase the asset being made. In the event of either party only being able to secure a guarantee in principle within 14 (FOURTEEN) days as contemplated aforesaid, the receiver and liquidator may, in his sole discretion, extend the period of 14 (FOURTEEN) days for up to a maximum of a further 30 (THIRTY) days. Should any of the time periods in this paragraph not be adhered to and/or complied with, the option to purchase any such asset offered for purchase by the receiver

and liquidator shall automatically lapse and shall not be capable of revival save by mutual written agreement between the parties.

2.11 To collect debts due to the joint estate.

2.12 To pay or allocate the liabilities of the joint estate.

2.13 To, during the course of realising the joint estate, deal with the assets in his discretion, including the freezing of bank accounts.

2.14 To institute legal proceedings out of any court with the necessary jurisdiction against any person for the delivery to him of such documents as he considers necessary for the purposes of enabling him to discharge his duties.

2.15 To apply to Court on notice to the parties for any further directions as he shall or may consider necessary.

2.16 To deduct his fees from the amount available for distribution to the parties after the collection of all assets and the discharge or allocation of all liabilities, subject to para 2.8.1 or 2.8.2 above.

2.17 To bring into calculation and/or reckoning in his distribution the reasonable market value of any asset or the actual monetary value of monies belonging to the joint estate, as at the date of the divorce, that either party may have disposed of, whether such party received value or full value thereof.

2.18 To bring into calculation and/or reckoning in his distribution such payments as the parties may agree were made by the respondent to the applicant on account of her share of the joint estate. Where the respondent claims a payment was made as contemplated in this paragraph and the applicant disputes same, the receiver and liquidator shall submit such determination, on application and on notice to both parties, as an opposed interlocutory application or such proceedings as he may deem meet in the circumstances in the event of a factual dispute, for decision by this court.

2.19 To thereafter, but subject to the powers hereinbefore set forth, determine the division of the assets on behalf of the joint estate after the payment of its liabilities.

3.

3.1 The receiver and liquidator shall, within a reasonable period of time after the exercise by him of the powers referred to in paras 2.1 to 2.19 hereof, furnish the parties with a provisional liquidation and distribution account, to which account the parties will be entitled to raise objections within fourteen days from the date of receipt thereof.

3.2 Should the receiver and liquidator not receive objections within the period referred to in para 3.1 hereof, the account shall be deemed to have been confirmed by the parties and the receiver and liquidator shall proceed to make a distribution in accordance with the tenor thereof.

3.3

3.3.1 Should the receiver and liquidator, however, receive written objections from either or both of the parties, after affording them an opportunity of submitting representations to him, he shall determine the objection or objections and amend his account in accordance with such determination/ determinations and render a final amended account to the parties marked “Final amended account”.

3.3.2 In order to place him in a position to make such determination / determinations the receiver and liquidator shall be entitled to apply to Court, on notice to the parties, for such directions as he considers necessary.

3.3.3 In the event of either parties not being satisfied with the determination made in terms of para 3.3.1 hereof, the party not so satisfied shall, within 14 (FOURTEEN) days of the final amended account being provided to parties, approach this court

with such legal proceedings to this court as may be deemed meet, failing which the account will become final and binding on the parties.

4. After the occurrence of the events referred to in paras 3.2, 3.3.1 and 3.3.3 hereof, the receiver and liquidator shall make a distribution in accordance with the relevant accounts, whereafter he shall be released of his duties as receiver and liquidator. In the event of either party acting in terms of para 3.3.3 hereof, the receiver and liquidator shall make no distribution until such time that the contemplated legal proceedings have been finalised.

5. The receiver and liquidator shall be entitled to payment of his reasonable fees, which fees he shall apportion equally between the parties, subject to paragraphs 2.8.1 and 2.8.2, and which fees shall be reflected in the accounts referred to in paras 3.2 and 3.3.1 hereof.

6.

6.1 The costs of the application (other than those arising from the respondent's counter-application) shall be paid by the receiver and liquidator out of the assets of the joint estate on the basis that they are to be brought into account in the liquidation thereof.

6.2 The counter-application of the respondent is dismissed with costs, such costs to include the costs consequent upon the engagement of two counsel.

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CE THOMPSON

ACTING JUDGE OF THE HIGH COURT

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