

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

Case number: 2020/19028

REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED
18 October 2021

N[....] K[....]

Applicant

and

E[....] K[....] N.O

Respondent

Delivery: This judgment is handed down electronically by circulation to the parties' legal representatives through email and released to the court's library. The date for hand-down is deemed to be 18 October 2021.

Summary: Application- compelling Receiver and Liquidator to delivery all relevant documents and or vouchers listed in the Liquidation and Distribution account. The documents and vouchers demanded were delivered before the filing of the answering affidavit. The application rendered academic.

JUDGEMENT

Molahlehi J

Introduction

[1] The applicant in this matter seeks an order compelling the respondent to deliver all documents or vouchers reflected in the Liquidation and Distribution Account (L & D account) of the joint estate of the applicant and her former husband, Mr K[....]. The notice of motion reads as follows:

"1. That respondent be ordered within 10 days of granting of this order to deliver all the necessary documents (vouchers) of all items reflected in the Liquidation and Distribution Account of the joint estate of David Mabadi K[....] and N[....]g Gloria K[....].

2. In the event that the aforementioned respondent fails to comply with the order granted in terms of paragraph 1 above, the applicant may apply for an order:

a. Payment of the sum of R 950 000.00;

b. Interest thereon at the rate of 21.5% per annum calculated from date of registration of Portion 5 Erf [....] Buccleuch Township to date of payment both day inclusive . . ."

[2] The applicant also applied for condonation for the late filing of the answering affidavit, which is unopposed. In considering all the relevant factors, I conclude that it is in the interest of justice that condonation be granted.

[3] The main application is opposed by the respondent Mr E[....] Baloyi, the attorney appointed in his capacity as the Receiver and Liquidator of the joint estate of the applicant and her former husband.

Preliminary points

[4] The respondent has raised a preliminary point concerning non-joinder of Mr K[....]. Mr K[....] ought, according to the respondent, to have been cited in these proceedings because of the allegations made by the applicant in the founding papers.

[5] The trite test for joinder or non-joinder is that a party sought to be joined in the proceedings must have a direct and substantial interest in the matter. The test was

set out in *Klaase and Another v Van der Merwe N.O and Others*,¹ in the following terms:

"The test for joinder is that a party must have a direct and substantial legal interest that may be affected prejudicially by the judgment of the court in the proceedings concerned. In *ITAC*, the CC confirmed the test and said that a party seeking joinder must have a direct and substantial interest in the subject matter. The court held that the overriding consideration is whether it is in the best interest of justice for a party to intervene in litigation".

[6] In *Morgan v Salisbury*,² the court held that the question of joinder does not depend on the nature of the subject matter but upon how and the extent to which the court order may affect the interests of the said party. The court further held that the fact that a party has an interest in the outcome of litigation does not warrant joinder.

[7] In the present matter, Mr K[...] may well be interested in the outcome of the application, but the interest is not substantial nor direct. Prayer 2 of the notice of motion quoted above indicates that the claim is directed at the respondent. Mr K[...] may be a witness in terms of the price placed on the immovable property, but that does not make him to have a direct interest in the matter. For this reason, I find that the joinder point raised by the respondent is unsustainable.

Background facts

[8] The applicant and her former husband were married in community of property before their divorce on 7 December 2015.

[9] It is common cause that the applicant and her former husband concluded a settlement agreement concerning the distribution of their joint estate following their divorce proceedings. The settlement agreement dealt with the division of the immovable property. In terms of the agreement, Mr K[...] offered to buy the applicant's undivided half share of the immovable property.

¹ 2016 ZACC 17 at para 45.

² 1935 AD 167 at 171.

[10] There is a dispute as to whether the "purchase price" for the immovable property was R900,000 or R950,000. This arose from the fact that in the settlement agreement, the amount is stated as R900,000, and in the affidavit deposed to in the subsequent application by Mr K[....], reference is made to R950,000. Be that as it may, as will appear later in this judgment, not much turns on this issue. It would appear that a dispute between the parties arose after the granting of the divorce decree. The dispute was not about the immovable property but the other assets in the estate.

[11] After receiving the divorce decree and failing to comply with the provisions of the settlement agreement, Mr K[....] launched an application, which the applicant did not oppose, for the appointment of the respondent as the Receiver and Liquidator of the joint estate.

[12] The affidavit in support of the application for the appointment of the respondent confirmed the settlement agreement and value of the immovable property, which is stated as R950,000. After the payment of this amount, the immovable property would be transferred into Mr K[....]'s name. There is no evidence that the payment was ever made. It is however, alleged that the respondent transferred the property into the name of Mr K[....].

[13] The powers of the respondent as the Receiver are set out in the court's order the following terms:

"Mr E[....] Baloyi (the respondent) is appointed to realise the whole of the community estate including assets, movable and immovable, and for the purpose to sell them or any part of them, by public auction or by private agreement as it may seem most beneficial with leave of both parties to bid, to collect debts due to the joint estate unless the same is disposed of by sale, to pay liabilities of the joint estate and to prepare final account between the parties, and to divide the assets of the joint estate after payment of the liabilities in accordance with the account. The Liquidator may apply to the court for any further direction".

The issues

[14] The main issue in this application turns on whether the issue of the delivery of the voucher is still an alive dispute between the parties.

[15] The respondent deals with this issue in paragraphs 40 and 41 of the answering affidavit in the following terms:

“[40] ... I submit that at the commissioning of this affidavit, the documents/ vouchers had already been delivered by my attorneys and there is no reason for the application to proceed. I submit further that if there are any further issues around the documents /vouchers, same should be addressed to myself in my capacity as the Receiver without pursuing this application.

[41] Once more, I submit that the documentation/vouchers were delivered before the matter was set down for hearing. I reiterate that what I needed from the parties was an undertaking that my fees would be paid since the state was technically insolvent”.

[16] The essence of the above is that the respondent contends that he has complied with the applicant's request in September 2020 and therefore there is no need to pursue the relief sought by the applicant in the notice of motion.

[17] The applicant in the replying affidavit does not deal with the above instead the case of the applicant focuses on the criticism of the failure by the respondent in the L & D account to deal with items listed therein. She lists a number of discrepancies in the L & D account, which she claims the respondent has failed to explain to her attorney of record. She criticised the respondent for bias and accused him of developing the L & D account without verifying the items listed therein with the relevant entities.

[18] In my view, the applicant's contentions are unsustainable because they do not accord with the pleaded case in the notice of motion, more particularly prayer 1(one) thereof. It is clear from the reading of prayer 1(one) of the notices of motion quoted above that the respondent was required to deliver "all the necessary documents/vouchers of all items reflected in the liquidation and distribution account of the joint estate...”

[19] In the circumstances, I find that although the respondent belatedly delivered the documents/vouchers demanded by the applicant in prayer 1 (one) of the notice of motion, the issue has become academic.

[20] Turning to prayer 2 (two) of the notice of motion, it is clear that the relief sought is in the alternative. It is depended on whether or not the respondent delivers the documents. In other words, it would fall away if the respondent was to comply or if it was found that the relief sought is unsustainable. As stated above, the documents have been delivered, and thus the issue of failure to deliver them does not arise. For reason it follows that the relief in paragraph 2 (two) of the notice of motion is unsustainable.

[21] In light of the above, I find that the applicant's application stands to fail.

Order

[22] The application is dismissed with costs.

E Molahlehi
Judge of the High Court,
Gauteng Local Division,
Johannesburg

Representation:

For the Applicant: Adv T Ntoane

Instructed by: Molefe Dlepu Attorneys.

For the Respondent: Adv W B Ndlovu

Instructed by: Mkhabela Attorneys.

Date heard: 27 July 2021

Date delivered: 18 October 2021