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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

APPEAL CASE NO: A3139/2021
REPORTABLE: Yes
OF INTEREST TO OTHER JUDGES: No
11/10/2022

In the Full Bench appeal between:

N [....] P [....] S [....] Appellant

and

M [....] Z [....] K [....] Respondent

JUDGMENT

This judgment is deemed to be handed down upon uploading by the Registrar to the electronic court file.

Gilbert AJ:

1. The central issue on appeal is whether a liquidator and receiver can be appointed by the court to:

1.1. determine the content and value of the estates of spouses previously married under the accrual system as contemplated in section 3 of the

Matrimonial Property Act 88 of 1984 (“the MPA”) for purposes of an accrual claim under that section; and

1.2. then realise the assets of the spouse whose estate has shown the greater accrual in satisfaction of the other spouse’s claim for half that accrual.

2. It does not appear that this issue has received specific attention, at least not in any reported authorities. Although the issue arose tangentially in *LD v JD* [2021] 1 All SA 909 (GJ), where the court found that such relief was not competent,[1] it was unnecessary for the court to closely consider the issue.

3. The facts are straightforward and undisputed.

4. The parties were married out of community of property subject to the accrual system. The marriage was dissolved on 6 December 2016 by the regional court for the regional division of Gauteng held at Johannesburg. Apart from dissolving the marriage, the regional magistrate ordered that there be “*payment of one half of the accrual of the estate of the spouse whose estate showed more growth to the other spouse*”.

5. The regional court did not determine the amount of the accrual of each estate, and so did not determine which spouse had a claim against the other for one half of the difference of the accrual.

6. The parties were unable between themselves to give effect to the order insofar as it relates to the accrual claim and so the applicant, who was the defendant in the divorce proceedings, launched an application in the regional court on 23 July 2021 seeking an order to the effect that a receiver and liquidator be appointed with the powers, effectively, to take control of the separate estates of each of the parties as at the date of the divorce, to then effectively determine the extent of the accrual and so determine the extent of the accrual claim, and to then realise the assets in

[1] Paras 18 & 19.

the relevant estate towards satisfaction of the accrual claim in favour of the other spouse. Although the relief was not quite formulated in these terms, this summary will suffice for present purposes.

7. The appellant, in her founding affidavit in the regional court, advanced no basis for the appointment of a liquidator and receiver other than to assert that it is desirable and necessary to do so because to date effect could not be given to the divorce order.

8. The application does not appear to have been opposed.

9. The regional magistrate, who happened to be the same magistrate that had granted the divorce order, declined to make the order. His reasoning was that it was unnecessary to apply to court for an appointment of someone to undertake the task of determining the accrual as this was an accounting exercise that could be undertaken by any suitably qualified person that the parties may agree to. The magistrate reasoned that there was no need for the order as the parties should mutually agree to appoint the appropriate person to assist them to give effect to the court order.

10. The regional magistrate states in his reasons that he was informed during the hearing by the appellant's attorney that the respondent had consented to an order. This may, to some extent, explain the reasoning of the regional magistrate that if there was such consent, the parties had effectively agreed to the appointment of the specified liquidator and receiver and therefore there was no need for the court to make any order.

11. The appellant was dissatisfied with the refusal of the regional magistrate to make the order and accordingly brought the present appeal before the full bench.

12. In her notice of appeal, the appellant states that there had been no cooperation between the parties in order to give effect to the court order and that therefore the regional magistrate had misdirected himself in not granting the relief authorising the appropriate person to undertake the task of both determining the

accrual and then realising the necessary assets to give effect to payment of the accrual claim.

13. This challenge of the regional magistrate's decision appears to be misdirected in that there was no evidence before the regional magistrate that there was a lack of cooperation. It is only in the notice of appeal that the appellant appears for the first time, impermissibly, to advance the position that the parties were unable to cooperate with each other. To the contrary, as set out above, the magistrate was informed that the respondent had consented to the order.

14. Be that as it may, the magistrate refused the relief that the appellant seeks, and the appellant now seeks that this relief be granted on appeal. The question remains, even if evidence of non-cooperation had featured before the regional magistrate, whether it would have been competent for that court as a matter of law to have granted the relief sought by the appellant in the absence of agreement between the parties. It would not in these circumstances be appropriate to dismiss the appeal and refer it back to the regional court without addressing this issue, as this would not lead to 'a just, speedy and as much as be inexpensive settlement of the case'.[2]

15. Absent agreement between the parties, the question arises as to what is the source of power that would enable a court to appoint a liquidator and receiver with the powers described in the first paragraph of this judgment.

16. Wallis JA in *Morar NO v Akoo and Another* 2011 (6) SA 311 (SCA)[3] in deciding what powers can be accorded to a liquidator of a partnership, cautioned that once a court goes beyond merely enforcing a contractual obligation between the partners themselves, "*it is necessary to identify a source of its power to do so. That is central to the rule of law that underpins our constitutional order. Courts are not free to do whatever they wish to resolve the cases that come before them. The boundary between judicial exposition and interpretation of legal sources, which is the judicial*

[2] Section 87(d) of the Magistrates Court Act, 1944, in dealing with the wide powers of a court of appeal.

[3] Para 18 and 19.

function, and legislation, which is not, must be observed and respected. In this case no such source was identified".

17. In the present instance, the appellant did not advance before the regional magistrate any source of power that empowers the court to appoint a person with the far-reaching powers of determining the accrual and then realising a party's assets in satisfaction of the accrual claim. On appeal the appellant goes no further than to state in her notice of appeal that it is 'trite law' that a receiver can be appointed in marriages out of community of property with these far-reaching powers, relying upon the unreported decision of this Division in *Wilken v Freysen NO.*[4] The appellant further asserts in her notice of appeal that the liquidator is empowered to determine the accrual and to make the distribution in terms of the Insolvency Act, 1936 and section 3 of the MPA. As reasoned below, I disagree.

18. Sections 2 and 3 of the MPA provides:

> *"2 Marriages subject to accrual system*
>
> *Every marriage out of community of property in terms of an antenuptial contract by which community of property and community of profit and loss are excluded, which is entered into after the commencement of this Act, is subject to the accrual system specified in this Chapter, except in so far as that system is expressly excluded by the antenuptial contract.*
>
> *3 Accrual system*
>
> *(1) At the dissolution of a marriage subject to the accrual system, by divorce or by the death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the*

[4] 2019 JDR 1994 (GJ).

difference between the accrual of the respective estates of the spouses.

(2) Subject to the provisions of section 8(1), a claim in terms of subsection (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse."

19. Nothing in either of these sections or elsewhere in the MPA envisages the appointment of a liquidator, or empowers the court to appoint a person with the specified powers.

20. Nor can the Insolvency Act be the statutory source of such a power. Neither of the estates of the spouses are sequestrated and so there is no room for the operation of the Insolvency Act or any other insolvency provisions.

21. The decision of *Wilken v Freysen* also does not assist the appellant. In that matter the court had to deal with the liquidator's costs and how those were to be determined. In that matter the liquidator had been appointed by agreement between the spouses to determine and distribute the accrual of the estates. The court was not called upon and did not deal with any jurisprudential basis upon which a court could grant an order appointing a liquidator. The decision is therefore not authority for the proposition that the court has the power to appoint a liquidator with the specified powers in the absence of agreement between the parties. The appellant's submission that it is 'trite law' that the court can do so is incorrect.

22. It appears that the appellant conflates the position that applies where marriages in community of property are dissolved and where a liquidator can, and often is, appointed, with the position where marriages out of community of property subject to the accrual system are dissolved. Examples of the former include the oft-cited decision of *Gillingham v Gillingham* 1904 TS 609 and *Revill v Revill* 1969 (1) SA 325 (C).

23. The legal position in relation to the appointment of a third person to effect the division of the joint estate of persons that were married in community of property is distinct. In *Gillingham*, Rose-Innes CJ explained that:

> *"When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grants a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. 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 a court has to appoint curators it may nominate and empower some one (whether he is called a liquidator, receiver, or curator – perhaps curator is the better word) to collect, realise, and divide the estate.*"

24. It is the fact of the persons married in community of property having a joint estate in which they are effectively partners that gives rise to the power of a court to order a third person to collect, realise and divide that joint estate.

25. Our common law has long recognised the remedy available to an erstwhile partner to approach the court for the appointment of a liquidator to bring about the realisation and division of the partnership assets where that partnership is at an end and the parties cannot agree on the realisation and distribution of the partnership assets. The *actio communi dividundo* comes to mind. That remedy has readily been applied to the realisation and division of a joint estate upon the dissolution of a marriage in community of property, as is evidenced by *Gillingham* above and numerous other authorities.[5]

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[5] See, for example, *Van Onselen NO v Kgengwenyane* 1997 (2) SA 423 (B) at 427I – 428B, and the more recent *KM v TM* 2018 (3) SA 225 (GP) which does not have the patriarchal overtones of the

26. For example, Van Zyl J in *Revill*, in dealing with appointment of a third person to divide the joint estate upon dissolution of a marriage in community of property, applied the principle as described in the well-known text book on partnership law:

> *"In The Law of Partnerships and Voluntary Associations in South Africa by Bamford he states the position as follows in regard to partnerships in general: (at p. 75)*
>
> > *'Where there is no agreement and no immediate division of the assets is possible, each partner is entitled to a liquidation of the partnership assets and a share of the proceeds, and may approach a court for the appointment of a liquidator if there is no agreement as to the mode of liquidation, since 'no partner is entitled to arrogate to himself the sole right and power of liquidating the partnership estate'.' "*

27. But there is no such community of property and so no communal estate where persons are married out of community of property, albeit subject to the accrual system. As explained by Sutherland J, as he then was, in *JA v DA* 2014 (6) SA 233 (GJ):

> *"[7] Spouses married in community of property at common law merge their respective estates and are equal sharers of one estate from the moment they are joined until put asunder. The idea that one spouse may share in the separate and distinct estate of the other does not exist at common law. In our law the accrual system, created by statute, is the default system unless expressly excluded by an antenuptial contract…*
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> *[8] In a marriage which is indeed governed by the MPA (such as that in this case), what the statute requires about the identification of the assets and the value to be attributed thereto, must, self-evidently, be determined by what the statute itself provides. It is doubtful that the implications of the idea of an*

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earlier decisions of *Gillingham* (which is nearly 120 years ago) and *Revill* (which was over 50 years ago).

accrual regime can usefully be examined outside the framework of the MPA itself, which is sole progenitor of the regime. For that reason the text must be accorded its due primacy."

28. As there is no joint estate that arises in a marriage subject to the accrual system, the common law sources that empower a court to appoint a third person to divide a joint estate cannot apply.

29. As the legal concept of a marriage subject to accrual system is one created by statute, as highlighted by Sutherland J,[6] the statute itself needs to be looked at to see whether there is a source of power in the statute enabling the court to appoint a liquidator. And, as already explained earlier in this judgment, there is no such power. Whether this constitutes a lacuna of some sort that requires redress is not something for this court to do, at least not in the absence of the parties having identified a source of the power of a court to do so and after full argument having been heard.[7] That is probably best left to the legislature that created the legal concept of a marriage subject to an accrual system, and so for this court to observe and respect the divide between *'judicial exposition and interpretation of legal sources, which is the judicial function, and legislation, which it is not."*[8]

30. In any event, there are formidable obstacles, in my view, to the court having the power to grant, against the will of one of the parties, powers to a third person to (i) determine the accrual, and therefore the accrual claim under section 3 of the MPA; and (ii) to then realise the assets of the one former spouse towards settling that accrual claim.

31. Where there is a dispute, the parties are generally entitled to approach the court to resolve that dispute. No less than where there is a dispute relating to the accrual, including a dispute as to the content and value of the respective estates of

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[6] *JA v DA* above, para 8.

[7] In the present instance, no case was made out or argument advanced for a development of the law.

[8] See *Morar NO* as cited above, para 19.

the spouses. The court cannot, absent agreement between the parties,[9] devolve its duty to resolve that dispute to a third party, such as a liquidator or receiver.[10] To do so would infringe the parties' constitutional rights to have their dispute resolved by the court in terms of section 34 of the Constitution.

32. Once the accrual claim under section 3 of the MPA has been determined by the court in favour of one or the other of the former spouses, there is a judgment debt, which must be satisfied in the ordinary manner. The various provisions of our civil procedure including the Superior Court Act, 2013 and the Uniform Rules provide how a successful party goes about executing upon his or her judgment, including the attachment and sale in execution of the execution debtor's assets through the Sheriff. A court cannot appoint a third party such as a liquidator to realise a spouse's assets towards satisfaction of the judgment debt. To do so may infringe that party's constitutional right not to be deprived of property except in terms of a law of general application, as provided for in section 25 of the Constitution. While a liquidator or trustee appointed in terms of the relevant insolvency provisions has the power to realise the insolvent's assets, that is in terms of those specific empowering provisions provided for in the insolvency law.

33. The regional magistrate therefore did not err in refusing the relief sought by the appellant for the appointment of a liquidator and receiver.

34. The law is now settled that the accrual computation must be as at the date of dissolution of a marriage, whether by divorce or death.[11] The regional magistrate in his reasoning, correctly, appreciated that this calculation was to take place based upon the accrual as it was at date of the divorce. The regional magistrate continued that the calculation exercise could only take place after the divorce because it was

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[9] The parties can agree that the dispute be determined by a third person such as a referee in terms of section 38 of the Superior Courts Act, 2013. But the consent of the parties is required. Section 38(1) expressly provides that a matter may be referred to a referee for an enquiry and report 'with the consent of the parties'. See, for example, *TN v NN* 2018 (4) SA 316 (WCC), para 28, where there was such consent.

[10] As was held in *LD v JD* above, para 18.

[11] *AB v JB* 2016 (5) SA 211 (SCA) para 18 and 19, approving of *JA v DA* above, para 11 and 17.

only upon divorce that the value could be calculated, and indeed it is only then that the accrual claim arises.

35. It may that a two-stage procedure to the litigation becomes necessary. In the first stage the court determines whether the marriage is to be dissolved, and once dissolved and the dissolution date determined, only then can the calculation of the accrual take place for purposes of the accrual claim in terms of section 3 of the MPA. If there is a dispute, the parties are then to return to court in a second stage for the court to determine the accrual claim, including the extent thereof.

36. Sutherland J in *JA v DA*[12] recognised the inconvenience of this two-stage approach and therefore stated that it did not seem to him:

> "*inappropriate to sue for both the divorce and an order pursuant to s 3 of the MPA in a single action, in which the accrual order is made dependent upon the granting of a divorce order. For policy reasons, if no other, and the obvious saving of costs and avoidance of delay, the double-barrelled approach is preferable, a view shared by Olivier J [in the unreported case of Le Roux v Le Roux*[13]*] but which he reluctantly disavowed because of what, in his view, would be infidelity to the provisions of s 3. The pleading of circumspect prayers could probably overcome that danger of infidelity. Practical factors alone ought to determine whether any post-dissolution revisions to provisional calculations become necessary."*

37. In the present instance, this double-barrelled approach was not adopted in the regional court. It is therefore necessary for the appellant to approach the regional court to determine, as a second stage, the outstanding issues relating to the accrual and obtain an order pursuant to section 3 of the MPA. This second stage cannot be replaced by the court devolving its obligation to determine issues relating to the

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[12] Above, para 20, and subsequently confirmed by the SCA in *AB v JB* above, para 19. See also *TN v NN* above, para 26 and 27.

[13] [2010] JOL 26003 (NCK)

accrual and making the appropriate order in terms of section 3 to a third party such as a receiver.

38. The appeal is therefore to be dismissed.

39. The appeal was unopposed and so there will be no order as to costs.

40. An order is made that the appeal is dismissed, no order as to costs.

Gilbert AJ

I agree.

Manoim J

Date of hearing:	2 August 2022
Date of judgment:	11 October 2022
Counsel for the appellant:	M T Nkobi (Attorney)
Instructed by:	Nkobi Attorneys Inc.

No appearance for the respondent