REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MIDDELBURG (LOCAL SEAT)

CASE NO.: A4/19

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

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SIGNATURE **DATE**

In the matter between:

SETHUSI HEZEKIEL ZULU Appellant

versus

LINDIWE IRIS ZULU Respondent

JUDGMENT

MPHAHLELE J

[1] This is an appeal against the judgment of the Regional Court, Middelburg which was handed down on 14 November 2018. The court granted an order in favour of the respondent appointing a liquidator in the joint estate of the parties with some powers and responsibilities, amongst others, to take control of the immovable property, namely erf 3323 Ext 9 Kriel Mpumalanga and to sell the property on a public auction or by way of private treaty.

[2] The parties were previously married in community of property on 16 March 1990. This marriage was dissolved by an order of the court *a quo* dated 10 May 2016. The settlement agreement entered into by the parties was incorporated into the decree of divorce. The respondent initiated the divorce proceedings which were defended by the appellant. Accordingly, the appellant and the respondent were the defendant and plaintiff respectively, in the divorce proceedings.

[3] Clause 5 of the settlement agreement regulating proprietary consequences provides as follows:

> ***"IMMOVABLE PROPERTY AND DEBTS***
>
> *5.1 it is recorded that the parties are owners of the following immovable property:*
>
> *5.1.1* ***ERF 3323, EXT. 9, KRIEL, MPUMALANGA.***
>
> *5.1.2 The parties agree that this property is worth R400 000-00.*
>
> *5.1.3 The parties further agree that the property shall be retained by the defendant failing which is shall be sold in an open market at a market related price and the proceeds thereof shall be shared equally between them.*
>
> *5.1.4 ……*
>
> *5.1.5 Should the defendant wish to buy the plaintiff's half share, then the plaintiff agrees to transfer her half share to and from in favour of the defendant.*
>
> *5.1.6 the parties agree that at the time of selling of the house they shall cooperate with each other to ensure transfer to a third party and/or the defendant."*

[4] In its application for the appointment of a liquidator in the court *a quo*, the respondent stated that she has requested the appellant to sign a sale agreement to finalise the sale of the property to a third party without success. Therefore, the respondent maintains that the appellant has failed to comply or cooperate in the transfer of the property to a third party as specifically provided for in clause 5 of the settlement agreement.

[5] In opposition of this application, the appellant maintains that he was entitled to retain the property as provided for in the settlement agreement.

[6] The court *a quo* amongst others found that:

> *"the defendant failed to buy the plaintiff out or to co-operate in having the property sold to a third party." In its reasons for judgment, the court a quo stated the following: "… the settlement agreement did not make provision for how long the defendant could retain the property before it can be sold in an open market. I think this is a material error common to both parties if one considers the intention of the parties from the settlement agreement."*

[7] The appellant submitted that he retained the property and currently is still retaining the property. He submitted that the deed of settlement makes specific mention that, that the appellant is to retain the property; and if not, then the property be sold and the proceeds thereof be shared equally between the parties.

[8] The respondent contended that the settlement agreement granted the appellant the option to retain the property post-divorce, but that it was always subject thereto if the appellant would so choose, he was to pay to the respondent her half share of the value of the property.

[9] The gravamen of this appeal is the interpretation of clause 5.1.3 of the settlement agreement.

[10] In this matter I took cue from the matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1]**.** In paragraph 18 of the judgment the court stated the following:

> "*Judges must be alert, and guard against, 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; in a contractual context it is to make a contract for the parties other than the one they in fact made".*

[11] The clause in contention provides that the parties further agree that the property shall be retained by the appellant **failing** which it shall be sold in an open market at a market related price and the proceeds thereof shall be shared equally between the parties (my emphasis). The word 'failing' is used in this clause as a preposition. According to SA Concise Oxford

[1] 2012 (4) SA 593 (SCA).

Dictionary the word failing (preposition) means “if not.” It follows that the property shall be sold in the open market only if the appellant does not retain the property as provided for.

[12] The undisputed evidence is that the appellant retained the property and is still retaining the property. Under the circumstances, and on a proper interpretation of the clause, the property cannot be put up for sale in an open market in terms of the agreement. Therefore, the finding by the court *a quo* that the appellant ‘*is not entitled to continue to refuse any co-operation for the selling of the property which he is still retaining* ***unless he buys out the plaintiff and register the property in his name alone****’* is flawed (my emphasis). The court *a quo* clearly added a condition which is not provided for in the settlement agreement. It was never a condition of the agreement between the parties that the appellant would retain the property on condition he buys out the respondent and have the property registered in his own name. Clause 5.1.5 of the settlement agreement provides that *“Should the defendant wish to buy the plaintiff’s half share, then the plaintiff agrees to transfer her half share to and in favour of the defendant”.* This clause has no bearing on the clause in contention dealing with the current retention of the property by the appellant. The clause, if anything, grants the appellant an option, if he so wishes to buy the respondent’s half share.

[13] There is also no evidence supporting the court *a quo*’s conclusion that the fact that *‘the settlement agreement did not make provision for how long the defendant could retain the property before it can be sold in an open market’* is a material error common to both parties. It follows that this conclusion is also flawed.

[14] Lastly I do not agree with the court ***a quo’s*** finding that the respondent *“had no other alternative other than to ask the court for the appointment of the receiver and liquidator to finalise the joint estate”.* The appointment of a liquidator or receiver is designed to protect the ownership rights of the parties when they cannot agree on a suitable division of the joint estate. In this matter there is no need for a receiver or liquidator as the division has been agreed upon in terms of the settlement agreement which was made an order of court.

[15] The issue is the duration and/or conditions upon which the appellant could retain the property before it could be sold. One has to have regard of the intention of the parties and the surrounding circumstances.

[16] This point was canvassed in *Novartis v Maphil*[2], where the court had the following to note:

> *"This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. … It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties' intention"*
>
> *"A court must examine all the facts - the context - in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing"*

[17] In my analysis of the surrounding circumstances, I note that:

17.1 the parties agreed that the property was worth R400 000-00 and envisaged its sale and the proceeds thereof to be shared equally between the parties

17.2 the parties agreed that R35 000-00 shall be deducted from the appellant's half share of the proceeds of the property and be paid over to the respondent in *lieu* of her half share of the cattle.

[18] It is my considered view that these facts militate against the appellant's contention that he may retain the property indefinitely but what is conspicuous is the lack of detail regarding the duration and/or conditions upon which the appellant could retain the property before it could be sold. The lack of detail in this respect is clearly a drafting error but it is not for this court to attempt to remedy the situation by putting in words not justified

[2] [2015] ZASCA 111

by the wording of the settlement agreement. It is for the parties to the agreement and not for the court to remedy[3].

[19] Under the circumstances, in the absence of a conclusion that it was intended to continue indefinitely, this agreement may be varied or amended on application to court. A settlement agreement, once made an order of court, may only be varied or amended on application to court.

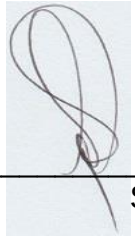
[20] The settlement agreement in the present matter contains a non-variation clause providing that the terms of the settlement agreement cannot be varied unless the variation is reduced to writing and signed by both parties. Therefore, any attempt to agree informally to vary such an agreement would fail.

[22] In the absence of any consensus between the parties, the settlement agreement may be varied by a formal application to court in circumstances where the order through error or oversight do not correctly reflect the true intentions of the parties.

[23] Accordingly, and for these reasons, I would allow the appeal and propose that the order of the court *a quo* be set aside.

[24] In the result, the appeal is upheld with costs and the order of the court *a quo* is set aside and replaced with the following order:

1. The application for the appointment of a receiver and liquidator of the joint estate of the parties is dismissed.

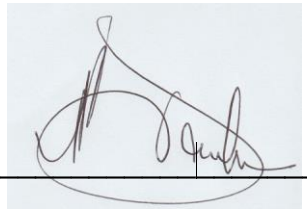


SS MPHAHLELE

JUDGE OF THE HIGH COURT

I agree,

[3] Du Bruyn and Others v Karstens 2019 (1) SA 403 at para 27 & 28



HF BRAUCKMANN

ACTING JUDGE OF THE HIGH COURT

RATSHIBVUMO AJ:

[25] I have read the erudite judgment of my colleague Mphahlele J. I agree, in principle, with my colleague's studious exposition of the law. I differ, however, with her on the application of the law to the facts of this case. The background facts are well potted in her judgment and would not be repeated here. I also agree with her approach that in deciding whether to appoint the liquidator, the court *a quo* had to interpret the settlement agreement incorporated as part of the divorce decree.

[26] In *Firstrand Bank LTD v KJ Foods CC*,[4] the SCA held that in interpreting the terms of contract or legislation as the case may be,

> "the principles enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5]; and *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*[6] find application. These cases and other earlier ones provide support for the trite proposition that the interpretive process involves considering **the words used** in the Act in the light of all relevant and admissible context, including **the circumstances** in which the legislation came into being. Furthermore, as was said in *Endumeni,* **'a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results'**. Thus… the court must consider whether there is a sensible interpretation that can be given to the relevant provisions that will avoid anomalies. Accordingly, in this instance, the proper approach in the interpretation of the provisions is one that is in sync with the objects of the Act, which includes '[enabling] the efficient rescue and recovery of financially distressed companies, *in a manner that* A *balances the rights and interests of all relevant stakeholders*' (own emphasis).

[27] In applying these principles to the facts of this case, it would be wrong in my view to focus only on a clause raised by the appellant in opposing

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[4] 2017 (5) SA 40 (SCA) para 75
[5] 2012 (4) SA 593 (SCA)
[6] 2016 (1) SA 518 (SCA)

respondent's application and ignore the rest of the clauses pertaining to the property, in particular those that would enable the court to have a full background of the circumstances. The fundamental principle of statutory/contractual interpretation is that words must be given their ordinary meaning, unless to do so would result in an absurdity.[7]

[28] In light of the above, it is necessary to examine the full details of the clause(s) leading to the application for the appointment of a liquidator. The relevant clauses from the deed of settlement provide,

> "IMMOVABLE PROPERTY AND DEBTS
>
> 5.1. It is recorded that the parties are the owners of the following immovable property:
>
> 5.1.1 ERF 3323, EXT 9, KRIEL, MPUMALANGA.
>
> 5.1.2 The parties agree that this property is worth R400 000.00
>
> 5.1.3 The parties further agree that the property shall be retained by the Defendant failing which it shall be sold in an open market at a market related price and the proceeds thereof shall be shared equally between them.
>
> 5.1.4 The parties agree that an amount of **R35 000.00 shall be deducted from the Defendant's half share of the proceeds / profit of the property and will be paid over to the Plaintiff** in lieu of her half share of the cattle.
>
> 5.1.5 **Should the Defendant wish to buy the Plaintiff's half share, then the Plaintiff agrees to transfer her half share** to and in favour of the Defendant.
>
> 5.1.6 The parties agree that **at the time of selling of the house they shall co-operate with each other** to ensure transfer to a third party and/or the Defendant.
>
> 5.1.7 **Bosman Attorneys shall attend to the endorsement** in terms of Section 45 (BIS) of the Deeds Registries Act, of the above property into the name of the Defendant or new purchaser, whichever is applicable.
>
> 5.1.8 **Both parties shall sign all the documents which they may be requested to sign in order to transfer and/or to endorse the property into the name of the Defendant or to new purchaser, whichever is applicable**.
>
> 5.1.9 Both parties shall sign all the necessary documents on demand in order to transfer the said property into the name of the Purchaser and should they fail to do so, they hereby authorise the Sheriff of the High Court (Kriel), to sign on their behalf;"
>
> (Own emphasis).

[7] See *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC).

[29] I have no doubt that if Clause 5.1.3 of the settlement agreement was the only provision on how the division of the property post-divorce, I would reach the same conclusion as my sister above. There are however other clauses that provide otherwise, such as the deduction of R35 000 from the appellant's half share of the proceeds of the sale of the property in lieu of the half share in the value of the cattle, in favour of the respondent. There cannot be any deduction of this amount from the property sale if the parties are in the same vein agreeing that the appellant should retain the property indefinitely. The half portion in value of the cattle is what the respondent was entitled to on the date of divorce being 10 May 2016. This value cannot remain stagnant over the years while the appellant remains in occupation of the property indefinitely (or until he "fails to retain it" which can only happen upon his death) – for the cattle would normally multiply an increase the value.

[30] Equally, the parties could not have agreed on the value of the property and the half share due to the respondent in case the appellant wished to buy her out of the property while the sale could only take place upon death of the appellant or such time when he would cease or fail to retain it. That could be several years later and its value may have changed drastically. In my view, this interpretation could result in absurdity or results that are not sensible or businesslike as envisaged in *Firstrand Bank LTD v KJ Foods CC*.[8]

[31] If clause 5.1.3 is given the literal words interpretation, it would contradict the rest of the contract pertaining to the division of the property as demonstrated above. In terms of the principles laid down in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*, the court cannot ignore the circumstances under which a contract is drafted. *In casu*, it was a divorce settlement terminating the marriage relationship between a husband and a wife, which marriage was in community of property that lasted over 16 years. In applying these interpretation principles to the facts, I reach a conclusion that the parties to this agreement had agreed to divide the assets in the following manner: As of the date of the divorce, the property

[8] *Vide* footnote 3 above.

was valued at R400 000. The appellant was afforded an opportunity to buy out the respondent by paying her half share of this amount. If the appellant fails to do this, the property should be sold in the manner detailed in clause 5.1.6 to 5.1.9 and from the appellant's half portion, a further R35 000 being the half portion of the value of the cattle, would be deducted in favour of the respondent.

[32] In *Madikizela-Mandela v Executors, Estate Late Mandela and Others*,[9] the SCA dealt with an appeal against the High Court's decision to refuse the appellant's application for a review. In dismissing the appeal, the SCA expressed a firm view that administrative decisions and litigation in general should reach finality expeditiously. In this case, almost four years after a divorce decree was granted, the parties are yet to realise the finality of the divorce litigation. The respondent has been waiting in vain for the benefits legislated in the Matrimonial Property Act[10] to also apply to her given the matrimonial regime that applied to her marriage of 16 years. From the papers files in the court a quo, the respondent demonstrated it well that the appellant refused to cooperate in sale of the property forcing her hand to approach the court once more, and this may not be the end. In my view this is unwarranted. The bonds of marriage were dissolved by the court and the liquidator appointment is necessary to give effect to the property division in accordance with the settlement agreement.

[33] I would therefore dismiss the appeal with costs

TV RATSHIBVUMO

ACTING JUDGE OF THE HIGH COURT

JUDGMENT HANDED DOWN VIA EMAIL ON

22 JUNE 2020 DUE TO C0VID 19.

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[9] 2018 (4) SA 86 (SCA) para 9.

[10] Act 88 of 1984. In terms of this Act, a husband are co-owners of the joint estate and upon divorce, the estate should be divided equally between the parties.