

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

CASE NO: B854/2023

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 22 January 2024

E van der Schyff

In the matter between:

K[...] M[...] C[...]

APPLICANT

and

PHILIP JORDAAN

FIRST RESPONDENT

G[...] C[...]

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

**Introduction**

[1] The applicant, Ms. C[...], and the second respondent, Mr. C[...], were married in community of property. Their marriage was dissolved in 2022. A liquidator was appointed to deal with the distribution of the joint estate. Ms. C[...] approached the court for, amongst others, a review of the liquidator's distribution account.

[2] Ms. C[...] appeared in person. On two occasions, to wit in this application and when the matter was initially heard in the urgent court, legal representatives were appointed by the Court to assist Ms. C[...]. Both representatives withdrew their assistance. Ms. C[...] filed several affidavits, and I am satisfied she was afforded sufficient opportunity to put her case before the court.

[3] I have considered all the affidavits filed by all parties. In order to finalise the dispute between the parties, and because of my view regarding the merits of the application, I dealt with the primary relief sought and not with the points in limine raised by the first respondent.

[4] Mr. C[...] initially appeared in person. He obtained *pro bono* representation when the matter was heard.

### **Grounds for review**

[5] Ms. C[...] avers that:

- i. Mr. C[...] contravened s 15(2)(f) of Matrimonial Property Act 88 of 1989 (the MPA), and that the first respondent, the liquidator of the joint estate, failed to consider and affect an adjustment in her favour in terms of s 15(9)(b) of the MP;
- ii. The liquidator, Mr. Jordaan, failed to consider and include assets that belong to Mr. C[...] that are situated in Soshanguwe Block R, in the joint estate, and
- iii. The liquidator failed to apply the 'buying-out principle correctly.

### **Facts**

[6] It is common cause that the divorce order provided for the division of the joint estate. In terms of the divorce order, fifty percent of the pension interest due to Mr. C[...] on the date of the divorce was to be paid to Ms. C[...] 'when such pension accrues' to Mr. C[...]. The parties agreed in a settlement agreement incorporated in the court order that the pension interest would be paid out within 60 days after the

decree of divorce was granted. Clause 3.2 of the settlement agreement provides as follows:

'The parties agree to the division [of] the remainder of the joint estate taking into account the pension benefit the Defendant (Ms. C[...]) receives as set out in clause 3.1 above'.

[7] The order provided for the appointment of the first respondent, Mr. Jordaan, as liquidator of the joint estate in the event that the parties are unable to agree to the division of the joint estate.

[8] The parties could not agree to the division of the joint estate and approached Mr. Jordaan. Mr. C[...] indicated that he wished to retain the immovable property, which property was the communal home. Ms. C[...] indicated that Mr. C[...] could purchase her half share, and should he be unable to do so, that the property be sold.

[9] Mr. Jordaan provided both parties with an asset and liability statement, which they had to complete and return. He received the documents completed by Mr. C[...] but not the documents completed by Ms. C[...]. Despite further enquiries to Ms. C[...]’s erstwhile legal representative, no documentation was received regarding the asset and liability statement.

[10] Mr. Jordaan states that he proceeded with his mandate to divide the joint estate. He pertinently investigated the allegations by Ms. C[...] that Mr. C[...] is the owner of immovable properties situated in Soshanguve Block R, and found the allegations to be misplaced. During his investigations, he liaised with insurance companies, various experts, and reputable valuers and subsequently provided the parties with a provisional report.

[11] By 13 December 2022, no response was received from Ms. C[...], and Mr. Jordaan continued to finalise his report. On 14 December 2022, Mr. Jordaan received Ms. C[...]’s completed asset and liability statement and a valuation report. In terms of this valuation report, the value of the immovable property was higher than indicated in Mr. Jordaan’s final report. Despite receiving this valuation report very

late, Mr. Jordaan amended the final report by applying the average value to the immovable property and the distribution and allocation account.

[12] Ms. C[...] belatedly raised an issue of liabilities incurred by Mr. C[...] during the subsistence of the marriage. She claimed these had to be excluded in terms of section 15 of the MPA. Mr. Jordaan explained to Ms. C[...]’s erstwhile attorney that he has not been afforded the power to exclude a liability due to lack of spousal consent and that he cannot assume such a power without the court indicating such by means of a court order.

## **Discussion**

[13] I cannot fault the way in which Mr Jordaan dealt with determining the value of the immovable property, or calculated the buy-in amount. Mr. Jordaan cannot be faulted for finding that there is no evidence that Mr. C[...] owns additional properties in Soshanguve. Since Ms. C[...] agreed to Mr. C[...] buying out her half share, I can also not fault Mr. Jordaan for not selling the property at a public auction. As for additional assets that were stolen, the evidence speaks for itself, and I accept that such items were stolen and could not be dealt with in the distribution account.

[14] The issue that remains to be considered is the issue relating to the alleged liabilities incurred by Mr. C[...] during the subsistence of the marriage without Ms. C[...]’s consent.

### *Section 15(9) of the Matrimonial Property Act*

[15] Section 15(9) of the MPA provides as follows:

‘(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.'

[16] It is well accepted that the remedy for any loss suffered by a non-contracting spouse, in terms of s 15(9)(b), is an adjustment in its favour when the joint estate is divided.<sup>1</sup> Thompson AJ dealt with the interpretation of s 15(9) of the MPA in *M v M*<sup>2</sup> and affirmed that an adjustment in terms of s 15(9) of the MPA must be pleaded and ventilated in the pleadings during a divorce. After restating the principles regarding powers to be granted by the court to a receiver and liquidator of an estate, Thompson AJ held that an adjustment can only be affected by the receiver and liquidator during the division of the estate if the Court ordered the adjustment at the time of granting the decree of divorce.

[17] *The stare decisis* doctrine obligates me to follow the principle set down in *M v M* unless I am of the view that it is patently wrong. I share Thompson AJ's view that it is not for a liquidator to evaluate evidence and come to a finding on a balance of probabilities as to whether expenses incurred during the existence of a marriage, were incurred without a spouse's consent. A liquidator cannot usurp the powers of the divorce court. Mr. Jordaan is correct in submitting that as receiver and liquidator of the estate, he is not empowered to reflect any adjustment in the distribution account if the court did not order that adjustment. No grounds exist for reviewing and setting aside the liquidator's final distribution and allocation account.

#### *Interdict on eviction*

[18] Mr. C[...] seeks to set aside the interdict on eviction obtained by Ms. C[...] in the urgent court proceedings. This issue was not adequately ventilated in this court. In eviction applications, a court must consider a multitude of factors, of which the right to occupy is but one.

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<sup>1</sup> *Mulaudzi v Mudau and Others* (1034/2019) (2020) ZASCA 148 (18 November 2020) at para (15).

<sup>2</sup> (82156/14) [2017] ZAGPJHC 354 (20 November 2017).

### *Reconnection of water and electricity*

[19] It is trite that a party may not take the law into its own hands. Ms. C[...] filed an affidavit dated October 2023 stating that Mr. C[...] disconnected the water and electricity to the home. This aspect was not canvassed during argument nor mentioned in any of the further affidavits filed. Since it was not adequately ventilated, no order can be made in this regard.

### **Costs**

[20] The principle that costs follow success applies. Ms. C[...], or her legal representative at the time, failed to respond to numerous letters sent by Mr. Jordaan. The first respondent, as receiver and liquidator of the joint estate, can, not be out of pocket because of this litigation. The circumstances justify that his costs should be paid on an attorney and client scale. Since Mr. C[...] was represented pro bono, no costs order is made in his favour.

### **ORDER**

**In the result, the following order is granted:**

**1. The application to review and set aside –**

**1.1. the sale of the immovable property, Erf 1[...], 6[...] F[...] T[...] Street, Karenpark, Pretoria North, and**

**1.2. the Final Distribution and Allocation Account drawn up by the first respondent, is dismissed.**

**2. The applicant must pay the first respondent's costs on attorney and client scale.**

E van der Schyff  
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on Caselines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant: In person

For the first respondent: Adv. L. Pearce

Instructed by: FA Steyn Attorneys

For the second respondent: Adv S. Barreiro

Instructed by: *Pro bono*

Date of the hearing: 1 December 2023

Date of judgment: 22 January 2023