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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER : 21233/2016

(1) REPORTABLE:	YES / NO
(2) OF INTEREST TO OTHER JUDGES:	YES/NO
(3) REVISED.	
.....16/3/2017..... DATE	 SIGNATURE

In the matter between

LETITIA BEZUIDENHOUT

Applicant

and

**THE MASTER OF THE HIGH COURT,
JOHANNESBURG**

First Respondent

HENRIK CHRISTIAAN NOLTE N.O.

Second Respondent

ESTELLE MAARTENS

Third Respondent

JUDGMENT

ANDRÉ GAUTSCHI AJ :

- [1] This is an application to review and set aside a decision by the first respondent (“the Master”) made on 25 May 2016 upholding an objection by the third respondent (“Mrs Maartens”) dated 19 January 2015 to the first and final liquidation and distribution account (“the account”) in the estate of the late Johannes Jacobus Smith (“the deceased”), together with ancillary relief, which includes declaratory relief.
- [2] Mrs Maartens (her present married name) and the deceased were married in community of property on 30 January 1988. They purchased an immovable property (Erf [...] Golf Park, Registration Division IR, Transvaal, situated at [...] Avenue, Golf Park, Meyerton), hereinafter referred to “the property”, for R65 000. The property was registered in their names as co-owners, each owning 50%, on 18 January 1989. A mortgage bond in the amount of R58 000 was registered simultaneously over the property.
- [3] Mrs Maartens instituted divorce proceedings against the deceased in the then Transvaal Provincial Division in Pretoria during 1996. The divorce was acrimonious, but a settlement agreement was eventually entered into on 6

March 1998. Mrs Maartens and the deceased were divorced by order of court on 24 April 1998, which order declared the settlement agreement as “binding” (“GELAS DIE HOF ...2. Dat die skikkingsakte (gemerk “B”) bindend verklaar word.”).

- [4] The issue in this matter is whether the property was dealt with in the settlement agreement, in which case it was to be the sole property of the deceased, or whether it was not dealt with in the settlement agreement, in which case Mrs Maartens is still a 50% owner thereof.

- [5] The deceased died on 27 November 2013. The applicant met the deceased in December 1996 and is the sole heir to the deceased’s estate.

- [6] When the first and final liquidation and distribution account was drawn up by the executor (the second respondent), the entire property was reflected as an asset in the estate. Mrs Maartens objected thereto, and the Master upheld her objection. It is that decision which is sought to be reviewed and set aside.

- [7] The settlement agreement is entirely in Afrikaans. It records *inter alia* that the parties have reached an agreement and desire to reduce the terms of the settlement to writing and that it be made an order of court. The relevant parts provide as follows :

“3. Die verdeling van die gemeenskaplike bates sal as gevolg geskied:

- 3.1 Eiseres behou haar vaste belegging ten bedrae van R45 000-00 as haar uitsluitlike eiendom.
 - 3.2 Eiseres behou the BMW motorvoertuig, maar sal verantwoordelik wees vir die maandelikse paaieimente in terme die kredietooreenkoms.
 - 3.3 Eiseres sal die volgende meubels ontvang [Then follows a list of 14 items or categories of furniture].
 4. Die Verweerder betaal aan Eiseres 'n bedrag van R30 000-00 in kontant, waarvan R10 000-00 betaalbaar is by ondertekening van hierdie skikking en R20 000-00 betaalbaar voor of op die 31ste Desember 1998.
 5. Die Eiseres sal geregtig wees op 50% van die Verweerder se Pensioenbelang soos op datum van Egskeiding. Die Verweerder onderneem om Eiseres se helfte aan haar uit te betaal by bedanking van die Verweerder uit sy werkgewer se diens.
 6. Die partye plaas op record dat the Eiseres geregtig is op die helfte van Verweerder se aandele belegging in die bedrag van R34 000-00 en welke aan haar betaalbaar sal wees oor vyf (5) jaar, plus rente teen 'n markverwante rentekoers.
 7. Die Verweerder behou alle ander bates asook sy gereedskap.
- ..."

[8] The applicant contends that on the plain reading of the settlement agreement, the words in clause 7 ("Die Verweerder behou alle ander bates ...") includes the property, with the result that the property was correctly included in the account. Mrs Maartens on the other hand contends that the immovable property is not included in the settlement agreement, and that she remains a 50% owner thereof, and for that reason the whole property should not have been included in the account, but only 50% thereof.

[9] On either version it is strange and unfortunate that the property is not

mentioned. If it was intended to be excluded from the settlement agreement, one would have expected that fact to be recorded therein. Should it have been intended to be included, one would equally have expected it to have been mentioned specifically. I therefore regard the fact that the settlement agreement does not refer specifically to the property as a neutral factor in the interpretation thereof.

- [10] Logically one would expect parties, especially in an acrimonious and drawn out divorce, to wish to make a clean break and to deal with all proprietary aspects, and certainly not to have to continue as co-owners of an asset into the future. The settlement agreement records that they had reached an agreement and wished to reduce the terms of the settlement to writing. Clause 3 refers to a division of their joint assets (without limitation). The recordal in clause 7 that the deceased would retain all other assets would seem to include the property.
- [11] On the other hand, Mrs Maartens (who unlike the applicant was a party to the settlement agreement) alleges that the divorce was so acrimonious that she and the deceased were unable to reach agreement on the immovable property and hence had specifically excluded it from the settlement agreement.
- [12] I assume in favour of Mrs Maartens that I am entitled to take into account her version of why the property was not mentioned in the settlement agreement, as part of the context or matrix within which the settlement agreement was

concluded. On the face of it, it is powerful evidence in her favour, and the applicant cannot and does not rebut it with direct evidence. But it does not withstand scrutiny. In the same breath as alleging that they could not reach agreement on the immovable property, Mrs Maartens alleges that they in fact reached agreement (orally) as to what would happen with the property, as follows :

“The deceased and I agreed that the deceased would occupy the property and would therefore be liable for expenses relating to the property such as municipal rates and taxes. The deceased would be entitled to occupy the house and the division of our interest in the property would only take place if the property is sold or on the death of any one of us.”

Those are irreconcilable statements. If they were able to reach agreement as she alleges, then it was possible to include it in the settlement agreement, despite the acrimony of the divorce. Moreover, the oral agreement contended for by Mrs Maartens is implausible in the extreme. It envisaged that the deceased would be entitled to occupy the property on an open-ended basis, and Mrs Maartens would not derive any benefit from her 50% share of the property for an indeterminate period. No provision was made as to when the property would be sold, save on the death of one of them, and the deceased and Mrs Maartens could have lived for many decades after the alleged oral agreement. Having been so careful to divide up every other asset in their joint estate, it is extremely unlikely that they would have dealt with the immovable property on so vague a basis.

[13] The parties' conduct subsequent to the conclusion of an agreement may

provide proof of their common intention at the time that they concluded the agreement, and it is accordingly accepted that such conduct may be considered as part of the contextual setting to ascertain the meaning of a disputed term¹.

- [14] Mrs Maartens' and the deceased's conduct thereafter also does not support her version of the oral agreement or her interpretation of clause 7 of the settlement agreement. For more than 15 years, until the deceased died, the deceased had the benefit of the property (albeit that he had to pay rates and taxes and electricity for the property), without demur from Mrs Maartens. The deceased alone made the bond payments, paid for the upkeep and maintenance of the property, and effected several improvements to the property, at his own cost, on the face of it treating the property as if he was the sole owner. When he died, according to the oral agreement on Mrs Maartens' version, the property should have been sold, but she made no attempt, alone or through the executor of the estate, to take steps to have it sold. A tenant was in the property for three months after the deceased died, and Mrs Maartens laid no claim to a part of the rental paid. When the applicant thereafter moved into the property, there was no objection from Mrs Maartens. It was only when the property was reflected in the account, more than a year after the death of the deceased, that she was galvanized into action.

¹ Unica Iron and Steel (Pty) Ltd and Another v Mirchandani 2016 (2) SA 307 (SCA) at para [21]

- [15] The aforesaid facts drive me to the conclusion that I am entitled to reject the version of Mrs Maartens, that the immovable property was deliberately not mentioned in the settlement agreement, and that she and the deceased had reached an oral agreement about the property, as far-fetched or clearly untenable² and rejectable purely on the papers.
- [16] I therefore find that the property is included in the words “alle bates” in clause 7 of the settlement agreement.
- [17] Counsel were agreed that if that were my finding, the review had to succeed, and the decision of the Master set aside.
- [18] For completeness, however, I mention that I am satisfied that the expression used in the divorce order (“GELAS DIE HOF ...2. Dat die skikkingsakte (gemerk “B”) bindend verklaar word.”) was simply another way of saying that the settlement agreement be made an order of court. In my view it can have no other meaning. That being so, the effect of the order would be that *dominium* in the property immediately vested in the deceased, and registration of transfer of Mrs Maartens’ 50% share was not a requisite for *dominium* to vest in the deceased³. Accordingly, the stance of counsel on both sides is in my view correct, and the application must succeed.

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5

³ Corporate Liquidators (Pty) Ltd & Another v Wiggill & Others 2007 (2) SA 520 (T) at para [16]

[19] In the result, I make the following order :

1. The first respondent's decision of 25 May 2016 to sustain the third respondent's objection dated 19 January 2015 to the first and final liquidation and distribution account in the estate of the late Johannes Jacobus Smith (estate number 20781/2014), lodged in terms of section 35(7) of the Administration of Estates Act, 66 of 1965, is reviewed and set aside.
2. The entire immovable property described as Erf [...], Golf Park, Registration Division I R, Transvaal, situated at [...] Avenue, Golf Park, Meyerton, is declared to be an asset in the estate of the late Johannes Jacobus Smith.
3. The second respondent is authorised to distribute the estate of the late Johannes Jacobus Smith in accordance with the first and final liquidation and distribution account dated 4 December 2014.
4. The fourth respondent is directed to give effect to this order insofar same may be necessary for the finalisation of the distribution of the estate of the late Johannes Jacobus Smith.
5. The third respondent is ordered to pay the costs of this application.

ANDRÉ GAUTSCHI

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 15 February 2017

Date of judgment : 16 March 2017

Counsel for the applicant : Mr R Grundlingh

Attorney for the applicant : Philip van der Merwe & Partners Inc
(Mr J Lombard)

Counsel for the third respondent : Mr P G Leeuwner

Attorney for the third respondent : De Klerk Vermaak & Partners
(L W van Wyk)

No appearance for the other respondents