

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE – PORT ELIZABETH)**

**CASE NO.: 549/04**

In the matter between:

**D M M**

**Applicant**

And

**N P M**

**1<sup>st</sup> Respondent**

**(BORN N)**

**CRAIG TODD DE LANGE**

**2<sup>nd</sup> Respondent**

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**JUDGMENT**

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**BESHE, J:**

[1] The applicant, who is represented by *Mr Nkanunu*, was the defendant in a divorce action between him and the respondent. On the finalization of the action, he was granted a decree of divorce with *inter alia* an order for the division of the joint estate. This decree was issued in May 2001. He now approaches this court for a declaratory order that the valuation of the assets of the joint estate be determined as at 4 May 2001 (date of issuing of the order for a decree of divorce).

[2] The first respondent who is represented by *Mr Naidu* is opposing the application. The second respondent who is the receiver and liquidator of

the joint estate of the parties gave notice that he will abide by the court's ruling in the matter.

[3] It would appear that the only substantial asset of the joint estate is immovable property: Erf. 2399 which is situated at KwaDwesi Township, Port Elizabeth, which was valued at R120 000.00 as at May 2001. It is common cause that the division of the estate has not taken place. The parties point fingers at each other as to why division has not taken place. But the fact of the matter is that division has not yet taken place.

[4] The basis upon which applicant seeks the relief as aforementioned in paragraph 1, as would appear from the notice of motion, is that:

“As a marriage in community of property was dissolved on the 4 May 2001, the determination of the value of the assets of the estate should be as at that date.” He seeks an order to the effect.

[5] *Mr Nkanunu* who appears for the applicant argued that the joint estate ended on the date of the dissolution of the marriage and that the valuation of the joint estate should be determined as at date of the dissolution of the marriage.

[6] First respondent opposes the application on the basis that the grant of the order sought by the applicant will render an unfair advantage on him. She contends that the parties are entitled to inherit in equal shares, all benefits derived from the assets of the joint estate.

[7] In ***Peacock NO v Peacock N.O 1956 (3) SA 136***, where it transpired that, after approximately 20 years, the deceased had failed to mention the rights that he had in respect of a farm that he co-owned with his first wife

when he lodged an inventory of the first joint estate. This, after the death of his first wife. Upon his death, having married in community of property for the second time, the executor of the first joint estate brought an action against the executor of the second joint estate for orders, *inter alia*, declaring part of the farm as the property of the first joint estate. As is the case with the present matter, the existence of the right in question was not denied only the extent or value thereof was contested. *Hoexter JA* at page 141 had this to say:

“On that view it is clear that as between the deceased and the first joint estate, the *dominium* in the contractual rights remained vested in the joint estate and the deceased remained under a continuing obligation as a surviving spouse, to deliver those rights to the first joint estate.”

Later at B-C the learned judge states:

“But the result of his failure to comply with the requirements of the Act is that the *dominium* in the contractual rights still remains vested in the joint estate and must be liquidated and distributed by the executor of the estate. As the *dominium* has remained vested in the first joint estate, any interim increase in the value of those rights must necessarily be regarded as having accrued to the first joint estate.” (**my underlining**)

[8] In my view *Hoexter JA*’s remarks apply with equal force to the present matter. I agree with *Mr Naidu* that if the immovable property were to be evaluated as at date of the dissolution of the marriage for purpose of the division of the joint estate, that will give the applicant an unfair advantage over the first respondent. The marriage may have been dissolved in 2001 but the joint estate and therefore the parties’ rights in the joint estate remain undivided to this date. I see no reason why respondent’s rights in the joint estate, in particular the immovable property, should be limited to value of the property as it was at time of the dissolution of the marriage. I am not persuaded that the declaration

sought by the applicant will result in a fair and equitable division of the joint estate.

**[9] In the result the following order will issue:**

**The application is dismissed with costs.**

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**N G BESHE**  
**JUDGE OF THE HIGH COURT**

**APPEARANCES**

|                                    |   |                                                                                                                                                   |
|------------------------------------|---|---------------------------------------------------------------------------------------------------------------------------------------------------|
| For the Applicant                  | : | Mr S Nkanunu                                                                                                                                      |
| Instructed by                      | : | SILAS NKANUNU & VAN LOGGERENBERG<br>522 Govan Mbeki Avenue<br>North End<br>PORT ELIZABETH<br>Tel.: 041 – 487 0134<br>Ref.: S Nkanunu/gb           |
| For the 1 <sup>st</sup> Respondent | : | Mr V Naidu                                                                                                                                        |
| Instructed by                      | : | THE LEGAL AID BOARD<br>PORT ELIZABETH JUSTICE CENTRE<br>1 Uitenhage Road<br>North End<br>PORT ELIZABETH<br>Tel.: 041 – 408 2800<br>Ref.: D Naidoo |
| Date Heard                         | : | 7 November 2013                                                                                                                                   |
| Date Reserved                      | : | 7 November 2013                                                                                                                                   |
| Date Delivered                     | : | 19 November 2013                                                                                                                                  |