IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No: D1211/2020

IN THE MATTER BETWEEN:

LYNETTE DOREEN GILLOW **APPLICANT**

and

CLIFTON VERSFELD **FIRST RESPONDENT**
NEIL DAVID BUTTON N.O. **SECOND RESPONDENT**

ORDER

(a) The first respondent's counter application is dismissed with costs;

(b) It is declared that upon a proper interpretation of the settlement agreement concluded between the applicant and the first respondent dated 30 November 2016, clause 19 thereof falls to be interpreted to mean that the second respondent must only liquidate those assets of the universal partnership in respect of which no provision has been made in the settlement agreement for the retention thereof by either of the parties;

(c) The second respondent is directed to sell the Dorcliff property (clause 3 of the settlement agreement) and the Breede River property (clause 4 thereof) by private treaty or by public auction with the object of obtaining the best price therefor. If a sale of either or both of the said properties is not able to be achieved, then the second respondent shall cause a market valuation of such property/properties to be done as at that date and award the said property/properties in equal shares to the applicant and the first respondent;

(d) The second respondent is directed to cause the accounting to be done as contemplated by the provisions of clause 7 of the settlement agreement and incorporate the results of such accounting in the First Liquidation and Distribution Account;

(e) The second respondent is directed to prepare the First Liquidation and Distribution Account in accordance with the provisions of the settlement agreement, submit such account to the applicant and the first respondent who are directed to debate the account with the second respondent and in the event of any dispute arising therefrom, all parties are granted leave to approach this court for further directions. Within one (1) month of the finalisation of the First Liquidation and Distribution Account if one party is owed money by another party, that party who is indebted to the other is directed to make payment of such amount to the other party;

(f) The first respondent is directed to pay the costs of this application and such costs shall be brought into account by the second respondent in the Liquidation and Distribution Account and be debited against any amount owing to the first respondent but in the event of the second respondent opposing it, then the first and second respondents shall be jointly and severally liable for the costs of the application, the one paying the other to be absolved.

JUDGMENT

Delivered on: 23 June 2021

Hadebe J:

[1] The applicant and the first respondent ('the parties') were involved in a universal partnership ('the partnership') that subsisted until it was dissolved on 12 October 2012. As a result of the said dissolution and to cater for proprietary consequences of the dissolution, the parties concluded a written settlement agreement on 30 November 2016 ('the agreement').

[2] In terms of the agreement, the respective attorneys of the parties were mandated to attend to the implementation of the agreement and the preparation of the dissolution account and generally to liquidate the partnership as contemplated in terms of the agreement. In the same document, provision was made for the appointment of the second respondent ('the liquidator') to liquidate the universal partnership in the event that the attorneys of the respective parties are unable to do so. This eventuality was catered for in clause 19 of the agreement which provides as follows:

'19 <u>The appointment of a Liquidator</u>

(a) If for any reason any of the attorneys find that he is unable to agree upon or carry out any of his functions in terms of this agreement then attorney Neil Button of Stowell and Company shall be appointed as sole liquidator to liquidate the universal partnership.

(b) The operation of clause 19(a) shall be suspended for a period of six months from date of the agreement or such longer period as the parties may agree in writing'

[3] The parties having failed to agree on how the assets of the partnership were to be dealt with and the respective attorneys not having been able to implement the dissolution of the partnership, the provisions of clause 19 then came into effect enabling the liquidator to take over the liquidation of the partnership. Both parties have since signed the document relating to the appointment of the liquidator. The question that has now arisen between the parties and on which there is no

agreement is whether the document appointing the liquidator, replaces the agreement entered into between the parties or whether its terms must be read in conjunction with the terms of the settlement agreement for the purposes of liquidating the partnership.

[4] The argument by the applicant in this regard is that the clause in the appointment of liquidator agreement directing the liquidator 'to take possession of all the assets, both movable and immovable, in the joint estate' does not reflect the common intention of the parties. According to this argument, it was never the intention of the parties that the liquidator would take possession of the immovable properties and other assets which they had agreed would be retained by themselves. This, the applicant argues, is based on the fact that the parties had made specific provision in the settlement agreement that certain assets were to be retained by the parties.

[5] Initially, the first respondent was also of the same view. In a letter to the applicant's attorneys dated 13 February 2018 written by the first respondent's attorneys to the attorneys of the applicant, the third paragraph of the said letter reads as follows:

'We do not agree that Button is vested with all the rights and obligations as you allege. We have instructed Button to cease any further work until he is instructed by both yourself and the writer. You will no doubt appreciate that, one of the issues in dispute, is that when Button is appointed, having regard to the terms of the agreement, all of the assets of the parties must be liquidated and divided, and there is no provision made whatsoever for any of the assets to fall outside of such liquidation process. We do not believe that this was ever the intention of the parties, and it was certainly not our client's intention that this circumstance would be allowed. We say this purely by way of example and to demonstrate one of the issues requiring resolution'.

[6] Having been endorsed as a liquidator of the assets of the partnership, the second respondent went ahead and prepared the first liquidation account. The parties were informed thereof in a letter dated 27 September 2019. The respective attorneys were invited to comment thereon by 11 October 2019. The attorneys of the applicant objected to the first liquidation account in a letter to the liquidator dated 9

October 2019. They pointed out to him that the division of the universal estate subsisting between the parties had to follow the terms of the settlement agreement. The letter of objection referred to specific items that had been dealt with in the liquidation account and in respect of which objection was being raised. Likewise, in an email communication dated 9 October 2019, the attorneys for the first respondent raised objection to the Distribution and Liquidation account and the manner in which certain items had been dealt with. The objection on behalf of the first respondent made reference to specific items that had to be disregarded entirely for purposes of the Liquidation and Distribution account.

[7] The second respondent reverted in an email communication dated 21 October 2019 advising the respective legal representatives to meet and make a joint proposal to him and that in the case that they were unable to agree on the said proposal, he would then proceed to liquidate all assets belonging to both parties by way of public auction and that all funds would be paid into the liquidator's trust account. It is common cause between the parties that despite this notice by the liquidator, their respective attorneys were not able to settle the matter.

[8] In a letter dated 19 November 2019, the liquidator advised that seeing that the parties appeared to have failed to agree on any settlement, he then had no alternative but to take possession, liquidate and distribute the estate at his sole discretion in terms of his appointment letter. He further gave the parties a breakdown of how he intended proceeding in respect of the various assets in the universal partnership.

[9] On 26 November 2019, the attorneys of the applicant wrote to the liquidator expressing their disagreement with the proposed route. He was advised that his appointment letter and the powers contained therein had to be read in conjunction with the settlement agreement. His attention was drawn to the relevant provisions of the settlement agreement. He was urged to convene a meeting at which the parties and their legal representatives would present themselves and make oral submissions to him regarding their objections to the First Liquidation and Distribution Account. He was further invited to give an undertaking that he was not going to put up for auction certain, specified items.

[10] The engagements went back and forth between the attorneys of the parties and the liquidator until 15 January 2020 when the liquidator advised the parties that it had become apparent that no matter what route he took, neither party would be happy with the outcome. He indicated that the options were that either the liquidator had to proceed to liquidate all the assets of the estate immediately or one of the aggrieved parties had to bring an urgent declaratory to court.

[11] It was the applicant who made the first move by applying to court for an order on the basis of urgency. On 3 March 2020, the applicant was granted the following order that:

'1. The application is adjourned sine die.

2. The applicant is directed to deliver her replying affidavit by 24 March 2020 and is directed to deliver her answering affidavit to the first respondent's counter application by 24 March 2020.

3. The first respondent is directed to deliver his replying affidavit to the applicant's answering affidavit in the counter application by 7 April 2020.

4. Today's costs are reserved for determination at the hearing of the application.

5. In agreeing to this order the parties reserve their rights in regard to the question of urgency.'

[12] Having been granted an opportunity to respond, the first respondent filed his answering affidavit. It is in this answering affidavit that the first respondent's tone clearly changed on the issues in this matter. In a point in *limine* raised, the first respondent contended that the liquidator's mandate novated and overrode the settlement agreement and that the liquidator was empowered and obliged to act in terms of his mandate only. The other point in *limine* raised by the second respondent was that the application was out of time. This, he premised on his understanding that the email by the liquidator dated 15 January 2020 amounted to the liquidator's ruling. Based on this understanding, he avers that the applicant should have approached the court by 29 January 2020. The first respondent argues further that this application, having been issued out of time, there should have been an application for condonation explaining the delay. He thus prayed that the application had to be struck off the roll for lack of urgency. In so far as the second respondent is

concerned, he averred that the applicant was seeking rectification of the liquidator's mandate by seeking to interpret the liquidator's mandate. He indicated that he was opposed to such application and pointed out that there was no prayer for such rectification at any rate.

[13] In his counter application, the first respondent sought an order directing the second respondent to deal with the matter in terms of the First Liquidation and Distribution Account under cover of the letter dated 27 September 2019. In his response to the contents of the founding affidavit, the first respondent indicated that he was disputing that the settlement agreement is legally relevant. He aligned himself to the terms of the liquidator's mandate. According to the first respondent, the liquidator's mandate replaced and superseded the settlement agreement. He pointed out that the liquidator's mandate made no reference to the settlement agreement nor was it incorporated by reference into the liquidator's mandate.

[14] The first respondent disputes that his communication of 13 February 2018 bore the interpretation of the settlement agreement as interpreted by the applicant. According to him, this letter was sent in the context of attempting to resolve the dispute (between the parties) and was sent on a 'without prejudice' nature, notwithstanding that it was not marked as such. The first respondent argues that he and the applicant could never agree on the issues but particularly on one of the items of the partnership i.e. an entity referred to as Versfeld Enterprises. Whereas the applicant averred that an accounting had to be done and had gone ahead and proposed to the liquidator a debatement of this account, the first respondent further argues that the liquidator's mandate does not make provision for the debatement. He submitted that the court was the one to interpret the manner in which the universal partnership is to be distributed and to give directions to the parties and the liquidator in relation thereto.

[15] In her replying affidavit and answering affidavit to first respondent's counter application, the applicant basically disputed the submissions of the first respondent as contained in both his answering affidavit and his counter application. Of relevance, she disputed the argument that the second respondent had made a ruling and that he had implicitly dismissed the parties' objections. That being the case,

according to the applicant, it followed suit that she disputed that the time period for her to approach the court has expired. She further insisted in her argument that the liquidator's mandate did not replace and supercede the settlement agreement, instead it is supplementary thereto. Further, according the applicant, the liquidator's mandate was concluded at the request of the liquidator so as to define his powers insofar as the settlement agreement did not provide for same. The applicant highlighted the fact that the interpretation of the settlement agreement was highly relevant and that in the circumstances this application cannot be said to be misconceived.

[16] Before the matter was heard in court, the parties signed a joint statement of issues in dispute in line with the directives relating to opposed motions dated 11 January 2021. The issues were detailed as follows in the said document.

'1.1. Whether the partnership between the Applicant and the First Respondent falls to be liquidated in terms of both the Settlement Agreement and the Liquidator's mandate (the Applicant's contention) or in terms of the Second Respondent's mandate only (the First Respondent's contention) – this involves an interpretation of the various agreements;

1.2. Whether the Liquidator's Mandate falls to be rectified to accord with the Applicant's contentions;

1.3. Whether annexure M annexed to the Founding Affidavit constitutes the ruling of the Second Respondent requiring either party to bring the proceedings within fourteen (14) days of the date of such decision;

1.4. Whether the Applicant has launched the present application timeously – put differently, whether the Liquidation and Distribution account is binding on the parties.'

[17] A consideration of the agreement shows that the parties' intention was to have certain items of the partnership set aside to be the sole ownership of each party e.g. some immovable properties, investments, vehicles etc, as far as would have been possessed by either party at the dissolution date. In so far as the property that was not meant for sole ownership by either party, the respective attorneys were to arrange for the valuation of such and to have the value thereof accounted for in the dissolution account. In so far as the business venture, the Versfeld Enterpises CC, the settlement agreement makes provision for an accounting and debatement in so far as this account is concerned. This sub-clause in so far as the clauses relating

to this entity are concerned, clearly envisages the operation of this account even after the dissolution of the partnership, before the sale of the partnership and the dissolution of the proceeds therefrom.

[18] The mandate given to the liquidator as per his appointment is 'to take possession of all the assets, both movable and immovable, in the joint estate. . .' In pursuance of this mandate, and in a letter dated 27 September 2019, the liquidator went ahead and drafted his First Liquidation and Distribution Account and invited comments from the parties within a period of 14 days. In a subsequent letter dated 19 November 2019, the liquidator notes that the parties appear to have failed to agree on any settlement and that he had no alternative but to proceed to take possession, liquidate and distribute the estate at his sole discretion in terms of the appointment letter. In the said letter, he puts the parties on terms to the effect that unless he received instructions jointly from both parties or is interdicted by an application to court by close of business on Tuesday, the 26th November 2019, he would then proceed to instruct the auctioneers to continue with the realisation of the assets without any further notice to either party.

[19] The proposal in which it is intended to deal with the property of the universal partnership under cover of the letter of 19 November 2019, completely disregards the wishes of the parties as expressed in the agreement. The indications as per this proposed liquidation account are that even the residential properties together with the household furniture therein are meant to be uplifted and sold by public auction. A reading of the agreement clearly indicates that that was never the intention of the parties, hence the differentiation between the assets that are to be sold and those to be retained by the individual parties for their sole and exclusive ownership.

[20] I find the following paragraph in *Bothma-Batho Transport (EDMS) BPK v S Bothma & Seun Transport (EDMS) BPK* 2014 (2) SA 494 (SCA)[1] to be apposite in this application. This was what was said in that case:

'. . .Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process

[1] *Bothma-Batho Transport (EDMS) BPK v S Bothma & Seun Transport (Edms) BPK* 2014 (2) SA 494 (SCA) para 12.

of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. . .Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise"'. (footnotes omitted)

[21] The circumstances under which the two documents came into being related to the dissolution of the universal partnership between the parties. They sought to safeguard their interests, individually and mutually, in terms of the agreement. Their intentions are expressed in the said agreement. The liquidator's appointment is the product of the agreement as per clause 19. A reading of this clause does not seem to suggest that the mandate given to the liquidator grants him an extended discretion allowing him to disregard the wishes of the parties. Sight must not be lost of the fact that the appointment of the liquidator did not come about as a result of the parties having abandoned their wishes in so far as the method of the dissolution of the partnership is concerned. The only reason why clause 19 came into operation, was the failure of the respective parties' attorneys to agree on the manner in which the dissolution should be handled.

[22] The parties have correctly warned themselves that the issue of interpretation of these documents resides with the court. This principle was confirmed in *KPMG Chartered Accountants SA v Securefin Ltd and Another* 2009 (4) SA 399 (SCA)[2] where it was said that 'interpretation is a matter of law and not of fact and, accordingly interpretation is a matter for the court and not for witnesses and (or, as said in common-law jurisprudence, it is not a jury question)'. (Footnotes omitted)

[23] The art and approach to interpretation of documents was succinctly stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA)[3] where the following was said:

'. . . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the

[2] *KPMG Chartered Accountants SA v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) para 39.
[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.'

[24] This approach was refined in *Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd* 2018 (4) SA 358 SCA[4] that in the interpretation of documents 'it is not sufficient to merely regurgitate the relevant principles and to cite the leading authorities without actually applying them'. It was further stated that 'it must be evident from the interpretive process itself that the principles have been applied' and that 'merely paying lip service to them undermines the entire exercise'.

[25] Applying the *Endumeni* approach in the present case and considering the document relating to the settlement agreement and the circumstances attendant to its drafting, and also if consideration is given to the ordinary rules of grammar and syntax, and also the purpose to which it is directed, it is clear that the estate of the partnership had to be dissolved in two if not three dimensions. Personal property and certain immovable property was not to be dealt with in the same manner that the *Versfeld Enterprise CC,* for instance was to be dealt with. The purpose comes out clearly in this regard, the residential properties, the household furniture and also personal effects had to be retained by the individual parties. The material known to the two parties was that the universal partnership was being dissolved, but in their individual capacities, they made provision for what would happen after the dissolution of the partnership. Hence they made provision for the continuation of their lives in the sense of setting apart residential homes and other personal items.

[26] The second document, the appointment of the liquidator mandates the liquidator to 'take possession of all the assets, both movable and immovable in the joint estate…' What needs to be interrogated in this part of the mandate is whether this authority extends to the property already set apart for the individual ownership of the parties. Going back to the approach enunciated in *Endumeni*, one has to

[4] *Auction Alliance (Pty) Ltd v Wade Park (Pty) Ltd* 2018 (4) SA 358 (SCA) para 19.

determine if that would give a sensible meaning and interpretation to this clause or would such interpretation result in 'unbusinesslike result or undermine the apparent purpose of the document'. The parties herein are 67 years and 70 years respectively based on their identity numbers contained in the papers. To have each party's residential property, and household furniture and personal belongings put up for sale by auction as proposed by the liquidator, this would, in my mind, lead to unbussinesslike results and will definitely undermine the apparent purpose of this document.

[27] A consideration of clause 7 of the agreement dealing with the issues pertaining to *Versfeld Enterprises* gives a clear indication that the enterprise was bound to continue in operation until the sale of the said entity. It further shows that monies will be expended on behalf of both parties and also third parties until the said sale. This clause makes provision for the accounting to be made by either party for monies so expended. The proposed liquidation does not make provision for such accounting. The liquidator indicates that the proposal in this regard is to realise this asset and the funds will be paid into the estate bank account. It is clear that the clause as couched in the settlement agreement gives a safeguard against undue enrichment of either party at the expense of the other party. The proposed liquidation process, as it stands, does not cater for this eventuality.

[28] I believe that to attribute this meaning, disregarding the terms of the agreement, will definitely lead to insensible and unbusinesslike results. I have been asked to rule on four issues referred to earlier in this judgment. I have made the following ruling in that regard:

(a) In respect of issue 1.1, having considered the authorities that I have in this judgment, it stands to reason that my considered view is that the only rational and sensible way, which is fair to both parties is to have the partnership between the applicant and the first respondent liquidated in terms of both the agreement and the liquidator's mandate.

(b) Regarding issue 1.2, it follows suit from the above ruling that the liquidator's mandate falls to be rectified to accord with the applicant's contentions.

(c) and (d) I intend dealing with issues 1.3 and 1.4 jointly. I am not persuaded that annexure M constitutes the ruling of the second respondent for the following reason:

(i) A consideration of the last paragraph of annexure M clearly shows that the liquidator was not ruling on the matter. He gives options of either him liquidating all the assets or either party having to bring an urgent application for a declaratory to court. The applicant took up the second option given by the liquidator and on 12 February 2020 issued papers for an urgent application.

[29] Clause 1.13 of the Appointment of Liquidator provides:

'To rule on any objection and to allow or disallow either in whole or in part, and in which event such ruling shall be final should either or both of the parties fail to approach this Honourable Court for relief within 14 (fourteen) days of the date of such decision'.

[30] I have found that annexure M does not amount to a ruling of the liquidator and as such this clause does not come into operation. In the circumstances, the applicant cannot be said to have launched her application out of time. Having ruled on the issues raised by the parties, I am satisfied that the following order is appropriate in the circumstances:

(a) The first respondent's counter application is dismissed with costs;

(b) It is declared that upon a proper interpretation of the settlement agreement concluded between the applicant and the first respondent dated 30 November 2016 clause 19 thereof falls to be interpreted to mean that the second respondent must only liquidate those assets of the universal partnership in respect of which no provision has been made in the settlement agreement for the retention thereof by either of the parties;

(c) The second respondent is directed to sell the Dorcliff property (clause 3 of the settlement agreement) and the Breede River property (clause 4 thereof) by private treaty or by public auction with the object of obtaining the best price therefor. If a sale of either or both of the said properties is not able to be achieved, then the second respondent shall cause a market valuation of such property/properties to be done as at that date and award the said property/properties in equal shares to the applicant and the first respondent;

(d) The second respondent is directed to cause the accounting to be done as contemplated by the provisions of clause 7 of the settlement agreement and incorporate the results of such accounting in the First Liquidation and Distribution Account;

(e) The second respondent is directed to prepare the First Liquidation and Distribution Account in accordance with the provisions of the settlement agreement, submit such account to the applicant and the first respondent who are directed to debate the account with the second respondent and in the event of any dispute arising therefrom, all parties are granted leave to approach this Court for further directions. Within one (1) month of the finalisation of the First Liquidation and Distribution Account if one party is owed money by another party, that party who is indebted to the other is directed to make payment of such amount to the other party;

(f) The first respondent is directed to pay the costs of this application and such costs shall be brought into account by the second respondent in the Liquidation and Distribution Account and be debited against any amount owing to the first respondent but in the event of the second respondent opposing it, then the first and second respondents shall be jointly and severally liable for the costs of the application, the one paying the other to be absolved.

Hadebe J

APPEARANCES:

Date of Hearing:	18 January 2021
Date of Judgment:	23 June 2021
Counsel for the Applicant:	N.D. Hollis SC
Instructed by:	G M Parker Attorneys
Counsel for the 1st Respondent:	De Beer SC
Instructed by:	John Dua Attorneys