

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 56587/14

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES / NO. ☒ YES
(2)	OF INTEREST TO OTHER JUDGES: YES / NO. ☒ YES
(3)	REVISED.
12/06/2015	
DATE	SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67 PRETORIA 0001
2015 -06- 12
JUDGE'S SECRETARY REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

MARLYNI LOGANATHAN KUPPUSAMY

APPLICANT

and

AVENDARAM PILLAY

RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 12 June 2015

Heard on: 11 June 2015

HUGHES J

1. In this application, the applicant sought that a liquidator, Jacobus Frederick de Beer, be appointed for the purpose of the sale of the immovable property; to collect debt due to the joint estate, to prepare a final account and to divide the excess of the joint estate after payment of liabilities.
2. The respondent resisted the appointment of the liquidator on the grounds that;-

- (a) The applicant had embarked on the wrong cause to bring this matter by way of motion proceedings and ought to have proceeded by way of action by issuing of summons;
 - (b) From the powers attributed to the liquidator, the content of the founding affidavit, the answering affidavit and the replying affidavit, it was evident that this matter had a number of disputes of fact that needed to be ventilated by way of evidence; and;
 - (c) That the applicant was seeking for final relief without requesting that the matter be reversed for oral evidence.
3. Briefly, the parties were divorced on 1 October 2004 in the Durban and Coast Local Division. The parties concluded a settlement on 29 September 2004. In the aforesaid agreement at paragraph 4 the immovable property of the estate was dealt with. This paragraph reads as follows:

“4. *IMMOVABLE PROPERTY*

It is agreed that the immovable property situated at Unit 60 San Pablo Pretorius Street, Vorna Valley Midrand is to be sold and the proceeds are to be used to liquidate all the debts of the joint Estate. The Profits received are to be divided between the parties.”

4. To date the parties have not complied with paragraph 4. In the interim the property has been leased, vacant for 10 months, the respondent lived on the property and finally the property was leased again.
5. During the aforesaid periods, the respondent was in control of the property. He collected the rentals, paid the bond and rates attended to the maintenance thereof and cause improvement to be conducted. I must hasten to add that the applicant did at some stage make contributions to the bond and rates payment.
6. Mr De-Oliweira argued that this application be dismissed with costs. He stated that the applicant should have taken her case from the respondent's answering affidavit and should have foreseen that there were disputes of fact

that needed to be addressed. She should have also gleaned that there would be a counter initiated by the respondent. Lastly, it was clear from the liquidator's duties on the applicant's own version that if a party is not happy with his determination that party was free to come back to court. This he contended clearly indicates that the appointment of the liquidator would ultimately serve no particular purpose to have the resolution sought in paragraph 4 of the settlement agreement.

7. Mr Saaiman conceded that in the circumstances the matter should be referred to trial for the disputed issues to be adjudicated. Further, this should not be held against the applicant, as the respondent had for a while done nothing to ensure that paragraph 4 of the agreement was complied with and was content to handle the matters of the property as his own.

8. In considering this matter I am mindful of Rule 6(5)(g), which I set out below for early reference:

"Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise."

9. On the papers, the applicant did not seek for this court to invoke Rule 6(5)(g) however, in argument Mr Saaiman conceded that, that would be the correct route to proceed, after this was pointed out by this court. Mr De-Oliveira submitted that the circumstances where the applicant did not even seek that Rule 6(5)(g) be invoked it was undesirable to do so *mero motu*.

10. I refer to the *dicta* in **Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420(T) at 428H-429B**:

"It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because: he may

not want to be involved in the cost thereof; his prospects of success, after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)(g) to be invoked."

11. In my view, this is such an instance where I use my discretion to ensure that a just and expeditious decision comes to the fore. The estate of the parties, in respect of the immovable property has not been finalised from 2004, some 11 years later the respondent is administering the property as if it is his own. The applicant has indicated in the papers that no matter what she sought finality; she needed her share from the sale of the property as she planned for this to be her pension; the respondent in all decision-makings in relation to the property had ousted her.
12. On the other hand, the respondent in his papers complains that he has been left with the responsibility of maintaining the property with no assistance forthcoming from the applicant and he needs to be reimbursed for it. The respondent also states that he does not earn much of a salary and had to make do with the rental he received to cover the expenses in respect of the property. It was done without the assistance from the applicant and as such he contends that she is not entitled to 50% of the market related value of the property as set out in the settlement agreement.
13. I believe that in the circumstances of this matter it is proper and just to *mero motu* refer the matter to trial, in order to obtain an expedient and just decision. Further, it is in the interest of justice that the initial intention of the parties is fulfilled. On conclusion of the settlement agreement in September 2004, the parties resolved that the property be sold. To this end, they even concluded a purchase and sale agreement with a prospective purchaser at the very same time that they concluded the settlement agreement. Both parties are frustrated in one-way or another and from the argument advanced by both representatives, for applicant and respondent, both are keen to put this issue to bed. In the circumstances, justice should prevail over the situation that has

been let to develop. This court needs to take a robust approach and bring to finality the situation that prevails between the parties.

14. Turning to deal with the issue of costs, the respondent sought that a cost order be award in his favour as the applicant had not sought that the matter be referred to trial from the onset, the applicant when she received his answering affidavit should have appreciated that there were disputes of facts that emerged and should have abandoned this application and lastly the cause embarked on by the applicant from the outset was bad in law. The applicant submitted that the costs should be costs in the course. The applicant stated it was the respondent's attitude and manner in which he dealt with the issue that brought them to court in the first place. In addition, that which the respondent sought to reduces the applicant right of 50% of the market value of the property, were issues that were in dispute. The determination thereof would be an indicator of who was the party that was to bear the costs of the application.
15. It should be born in mind that the decision to refer the matter to trial was made *mero motu* by the court. The practicality of the order sought by the applicant was taken into account together with the fact that there are disputes of fact that require adjudication. It would only become clear after evidence is lead as to whom the successful party is in respect of these disputes raised.
16. In my view, the correct order will be for the costs to be costs in the cause. The trial court after hearing the evidence would be in a better position to deal with the issue of costs.
17. In conclusion I make the duly attached order marked as "X" an order of court.



W. Hughes Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No. 56587/2014

Before the Honourable Hughes J on the 11th of June 2015

In the matter between:

MARLYNI LOGANATHAN KUPPUSAMY

Applicant

And

AVENDARAM PILLAY

Respondent

~~DRAFT~~ ORDER

Having read the papers filed of record, heard argument in and considered the matter, the following is hereby ordered:

1. The application is referred to trial;
2. The Applicant's Notice of Motion dated 28 July 2014 shall stand as the Applicant's Simple Summons;
3. The Respondent's Notice of Intention to Oppose datd 25 August 2014 shall stand as his Notice of Intention to Defend;
4. The Applicant shall deliver her Declaration within 15 days from the date of the grant of this Order, whereafter the ordinary rules applicable to pleadings and trials shall apply; and

~~5~~ Costs of this application are reserved for the trial court. 

BY ORDER

REGISTRAR