REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 4516/2022

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED

DATE: 22.07.2024

SIGNATURE:

In the matter between:

B[…] L[…] M[…] **PLAINTIFF**

(BORN: M[…])

IDENTITY NUMBER 7[…]

-and-

S[…] M[…] M[…] **DEFENDANT**

IDENTITY NUMBER: 6[…]

JUDGMENT

BRESLER AJ:

Introduction:

[1] The matter came before court as a divorce trial. The greater part of the issues between the Plaintiff and the Defendant was resolved by agreement and the Court was presented with a proposed concept order in this regard.

[2] The parties are *inter alia* in agreement that:

2.1 The marital relationship between the parties has broken down irretrievably and no reasonable prospect exists of restoring a normal relationship.

2.2 A decree of divorce should be granted.

2.3 Mr Jacob de Klerk (Snr) will be appointed as liquidator of the joint estate.

2.4 Both parties retain parental responsibilities and rights with regards to the care of the minor child.

2.5 Primary care and residence of the minor child is awarded to the Defendant subject to the Plaintiff's right of reasonable access to the minor child.

2.6 The Defendant shall be responsible for the minor child's reasonable expenses.

2.7 Both parties retain their parental responsibilities and rights with regards to the guardianship of the minor child.

2.8 The Defendant shall pay an amount of R12,000.00 (twelve thousand rand) per month rehabilitative maintenance for the Plaintiff from the 1st day of the month following the granting of the decree of divorce and thereafter on or before the first day of each successive month for a period of 18 (eighteen) months.

[3] The parties agreed that the only remaining issue is the fixed deposit that was held in the name of the Defendant and that was allegedly dissipated by him. The origin of the funds comprising the investment is the sale of an immovable property allegedly donated by the Defendant's father to him.

[4] The parties were married in community of property. This court is called upon to determine if the value of the investment should be included in determining the joint estate having regard to the original of the funds.

<u>The Plaintiff's case:</u>

[5] The Plaintiff testified that the relationship between herself and the Defendant commenced during or about 1998. They were married in 2003, in community of property.

[6] At that time, the Defendant was running a business with his father at Mahwelereng Location. The Defendant's father passed away during or about 1999 and the Defendant continued with the business. Prior to his passing, the Defendant's father gave an immovable property to the Defendant. She has no knowledge of the allegation that the said property is excluded from the marriage in community of property.

[7] During or approximately 2016, the Defendant approached the Plaintiff with several documents requiring her signature. These documents related to the sale of the immovable property and the investment of the proceeds at Standard Bank of South Africa. To the best of her knowledge the proceeds of the property remained invested at Standard Bank in a short-term investment account.

[8] After summons was issued in the current divorce proceedings before court, it came to her knowledge that the Defendant withdrew the full investment amount. As a consequence of the withdrawal, the value of the Plaintiff's undivided share in the joint estate was diminished to the value of R2,525,235.00. The Plaintiff accordingly requires an order that an adjustment be affected in favour of the Plaintiff upon division of the joint estate.

The Defendant's case:

[9] The Defendant testified that was employed by his father. He furthermore testified that his farther purchased a stand for him. According to their culture, his father gave him the stand.

[10] He confirmed that his father passed away during or about 1999. He testified that he sold the stand during 2016 or 2017. He then invested the proceeds of the sale at First National Bank in his name for a fixed period of five years.

[11] He confirmed the withdrawal of the funds after the date of divorce. According to him the funds were utilised *inter alia* in his business as his business was not doing well. He persisted in his testimony that the withdrawal and utilisation of the funds does not concern the Plaintiff as it was a gift from his father to him.

[12] He conceded during cross examination that his father did not leave a will, no executor was appointed, and no formal process was followed. It is thus apparent that the donation was merely done orally and not reduced to writing. The relevance of this testimony will appear from what has been stated herein under.

Analysis of the applicable law:

[13] Section 5 of the **General Law Amendment Act**[1] reads:

[1] Act 50 of 1956

> *'No donation concluded after the commencement of the Act shall be invalid merely by reason of the fact that it is not registered or notarially execute: Provided that no executory contract of donation entered into after the commencement of this Act shall be valid unless the terms thereof are embodied in a written document signed by the donor or a person acting on his written authority granted by him in the presence of two witnesses.'*

[14] An executory donation is so called because it still requires to be affected or perfected, in the sense that something is required to be done before it can be regarded as completely performed.[2] Delivery would take place at some future time, for instance upon the death of the donor.

[15] *In casu* the Defendant alleges that his father donated the property to him. According to the evidence at hand, the property was simultaneously transferred from the Limpopo Provincial Government to the joint estate of the Plaintiff and Defendant and from the joint estate to Olympic Park Trading 171 (Pty) Ltd.

[16] It is trite law that registration is only *prima facie* evidence of ownership. As such, this Court is not concerned with the Deeds Office records. It is apposite to ascertain the factual position rather than rely on the Deeds Office records.

[17] The donation of the property from the Defendant's father to him was clearly executory in nature as his father in theory first had to take transfer of the property, before he could pass transfer to the Defendant. Some action was therefore required in order to validify the donation.

[18] The Defendant's submission that the property (and the proceeds) should be excluded from the joint estate, is solely premised on the argument that the property was donated subject to the *proviso* that is should not form part of the joint estate.

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[2] See ***Savvides v Savvides and Others*** 1986 (2) SA 325 (T) at 332

[19] In ***Scholtz v Scholtz***[3] the Supreme Court of Appeal remarked the following with regards to the difference in applying the **General Law Amendment Act** *supra*, as opposed to the **Alienation of Land Act**[4]:

'[8] In support of the contention the appellant referred to the meaning of 'alienate' as defined in this Act, which includes 'sell, exchange or donate'. To my way of thinking an executory contract of donation of immovable property – like the one under consideration – falls within the ambit of both these statutory enactments. But since the General Law Amendment Act appears to be the more stringent one, I think the court a quo was right in its approach that the validity of the donation at issue depends on compliance with this enactment.

[9] Having said that, I do not believe that in this case it would make any difference if we were to apply s (2) 1 of the Alienation of Land Act instead. A comparison of the two enactments reveals two additional requirements in the General Law Amendment Act. First, that the terms of the agreement must be embodied in the document. Second, that the written authority to sign on behalf of the donor must be given in the presence of two witnesses. The last-mentioned requirement clearly has no bearing in this case. As to the first requirement, s 2(1) of the Alienation of Land Act has been understood to contain virtually the same stipulation, albeit not expressly stated. This much appears from the following dictum by Maya JA in Stalwo (Pty) Ltd v Wary Holdings (Pty) Ltd and another 2008 (1) SA 654 (SCA) para 7:

'That [ie s 2(1)] means that the essential terms of the agreement ... must be in writing and defined with sufficient precision to enable them to be identified. And so must the other material terms of the agreement.' [See Johnson v Leal 1980 (3) SA 927 (A) at 937G – H.]

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[3] 2012 (5) SA 230 (SCA) at [8] to [9]
[4] Act 68 of 1981

[20] Irrespective of the credibility of the Defendant's evidence that the property was donated to him subject to the condition that it would not form part of the joint estate, the said donation was void for lack of statutory compliance.

[21] It follows that the purported donation could therefore not be excluded from the joint estate as the relevant terms, dealing with the said exclusion, was not reduced to writing. It stands to be noted that the said condition is in any event disputed by the Plaintiff to the extent that she never had knowledge thereof.

[22] Having regard to the legal position, this Court need not determine if the Defendant's version on the exclusionary terms is credible. It is common cause that the Deed of Donation, allegedly containing this critical term, was not reduced to writing and as such is rendered void.

[23] It is trite law that an agreement prohibited by common law or by statute is illegal. An illegal contract is unenforceable (*ex turpi causa non oritur action).* This rule is absolute and has not exceptions, even when there has been part performance.[5] A court is moreover *mero motu* entitled to raise the issue if illegality if it appears *ex facie* the transaction or the surrounding circumstances, provided the court is satisfied that all the evidence relating to the illegality was lead.[6]

[24] *In casu* neither party raised the issue of the enforceability of the alleged Donation Agreement. Evidence was however led to the extent that it was an oral donation from the Defendant's father resulting in the transfer of the immovable property.

[25] Having concluded the aforesaid, it follows that the proceeds of the sale formed part of the joint estate. But this does not automatically entitle the Plaintiff to the relief prayed for.

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[5] ***Jabhay v Cassim*** 1939 AD 537
[6] See Harms, **Amler's Precedents of Pleadings**, Seventh Edition, Lexis Nexis on page 219

[26] Section 15(9)(b) of the **Matrimonial Property Act**, Act 88 of 1984 (the 'MPA') dictates:

(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) ...

(b) that spouse knows or ought reasonably to know that he will probably not obtain the consent required in terms of 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.'

[27] Sections 15(2) and 15(3) of the MPA contain codified acts which are *per se* regarded as unlawful for the reason that they are, in essence, made at the expense of the other spouse.[7] It is trite law that an adjustment as contemplated in Section 15(9)(b) can only be granted by the court after being properly ventilated in the pleadings and in evidence.[8]

[28] The Plaintiff pleaded the following in her particulars of claim:

'The Defendant called up a fixed deposit at First National Bank with account number: 7[…] in the amount of R4 504 470.00 and inter alia withdrew an amount of R3 800 000.00 in cash during the period 4 November 2022 until 1 December 2022, without the permission or consent of the Plaintiff and as a result of which

[7] See ***Malebana v Jordaan NO and Another*** 2024 (3) SA 124 (GP) at [9]
[8] See ***KM v TM*** 2018 (3) SA 225 (GP)

the Plaintiff's undivided half share in the joint estate was diminished to the value of R 2 252 235.00.'

[29] The Defendant admitted the withdrawal but denied that any loss was suffered as the fixed deposit did not form part of the joint estate.

[30] During argument Mrs de Klerk, on behalf of the Plaintiff, submitted that Section 15(2)(c) applies to the facts *in casu* in as far as the Defendant made the withdrawal from a fixed deposit forming part of the joint estate without the consent of the Plaintiff. She referred the Court to the unreported matter of ***Mogola v Mogola***[9] being a full court decision delivered in this division.

[31] The following was stated in ***Mogola*** *supra* at [14]:

'I must mention, as a point of departure, that many of the past case law, did not authoritatively pronounce specifically on the proper interpretation of this provision, in particular, on the power of any of a spouse to alienate or otherwise encumber those investments or perform any juristic act specified in section 15(2)(c), ***"by or on behalf of the spouse"*** *in a financial institution, which investments* ***forming part of the joint estate".***

It is the words "any investment by or on behalf of the other spouse", in a financial institution "forming part of the joint estate", that require closer scrutiny as the notion present not only judicial interpretational difficulty, but also raise a legal novelty on this aspect of the law.'

[32] Of particular importance is the fact that the learned Judge referred to 'investment' and 'invested fixed deposit' interchangeably.[10] In paragraph 20.1 of the judgment, he concludes that Section 15(7) of the Act does not permit alienation of fixed deposits but

[9] (HCA30/2017) [2018] ZALMPPHC 57 (19 October 2018)
[10] See in particular paragraph [17] and [18]

alienation of ‘deposits’ held in his / her name that can be alienated without the consent of the other spouse. It is specifically stated that:

> *‘... There is therefore a marked difference between alienation of a fixed deposit without written spousal consent and an ordinary deposit which requires no spousal consent, the legal consequences of which should be differentiated for the purposes of proper interpretation of Section 15(2)(c)’.*

[33] Contrary hereto, in the minority judgment, Muller J stated the following:[11]

> *‘Section 15(2)(c) is directed at a spouse who wishes to alienate, cede or pledge a current fixed deposit in the name of the other spouse without his / her consent. The deceased, on the evidence, never on any occasion alienated, ceded or pledged to the first respondent, a fixed deposit held in the name of the appellant.*

[34] Muller J then concluded that the provisions of Section 15(3)(c) cannot be overlooked in as far as:

> *‘...it was contended that the deceased donated a large sum of money to the first respondent which by all accounts belonged to the joint estate and by doing so expressed his intention to exclude the amount from the joint estate. The court a quo took a narrow view of the facts which, as a consequence, brought about the failure to apply the provisions of section 15(3)(c) to determine whether the deceased made a valid donation or alienation, or whether requirements of section 15(8) were met.’*

[35] I respectfully agree with the reasoning of the Honourable Justice Muller in as far as it is evident that the critical difference between Sections 15(2) and 15(7) does not lie between the idea of a ‘deposit’ or a ‘fixed deposit’. Had this been so, care would have been taken by the legislature to provide a definition to distinguish between these

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[11] At [40]

concepts. The difference lies between assets of these nature being in the name of the other spouse as opposed to the spouse wishing to deal with these issues.

[36] I am furthermore in agreement with the Honourable Justice Muller's reasoning that one can however not avoid the consequences of Section 15(3)(c) in as far as the consent of a spouse must be obtained to alienate an asset of the joint estate without value.

[37] It has repeatedly been stated in the past that, in accordance with the principle of *stare decisis* (to stand by previous decisions taken), or the doctrine of precedent, a lower court is bound by the *ratio decidendi* (rationale or basis of deciding) of a higher court and courts of final jurisdiction are bound to their own decisions.[12] This Court is therefore bound by the majority decision of the Full Court pertaining to Section 15(3)(c).

[38] In as far as the majority in ***Mogola*** *supra* is concerned, the alienation of a fixed deposit requires the consent of the other spouse. In the absence thereof, the Plaintiff is entitled to the relief as contemplated in Section 15(9)(b) of the Act provided it can be shown that the joint estate suffered a loss as a consequence thereof.

[39] In his closing argument, Mr Grobler argued on behalf of the Defendant that the funds never formed part of the joint estate and the joint estate could therefore not suffer any loss. I have already stated herein before that, due to the invalidity of the alleged donation agreement, this asset indeed formed part of the joint estate and the proceeds of the sale is thus not excluded.

[40] Having regard to the testimony by the Plaintiff, the value of the fixed deposit on 10 November 2022 amounted to R4 504 470.84.[13]

[12] See ***Camps Bay Ratepayers' and Resident's Association and Another v Harrison and Another*** 2011 (4) SA 42 (CC) at [28] – [30]
[13] See page 63 of the Plaintiff's trial bundle

[41] An early redemption penalty of R199 579.59 was charged and the remaining balance was utilised by the Defendant for various purposes. Of particular importance is the fact that the Defendant testified that he did not want the Plaintiff to share in this amount. No evidence was led to the effect that the proceeds was utilised to increase the value of the joint estate in any way. It can only be surmised that the withdrawal and dissipation of the fixed deposit resulted in a loss as contemplated in Section 15(9)(b) of the Act.

[42] Even if this Court follows the reasoning of the minority judgment in ***Mogola*** *supra,* then the same result will be achieved. In terms of the provisions of Section 15(3)(c), a spouse shall not without the consent of another spouse, donate to another person any asset of the joint estate or alienate such asset without value. On the Defendant's own version, he utilised the funds *inter alia* in respect of his business. Very little documentary evidence was made available as to these allegations. In my view, this contravenes the provisions of Section 15(3)(c) entitling the Plaintiff to the relief in Section 15(9)(b).

[43] The Plaintiff must therefore succeed in her claim for adjustment of her portion of the undivided joint estate.

Costs:

[44] Mr Grobler raised the issue of the reserved costs pertaining to the appearance on 2 April 2024. Mrs de Klerk conceded that she appeared before this Court on the same day with another matter. Mr Grobler essentially argued that the postponement was occasioned by the fact that she had another commitment and she should therefore be deprived of her costs.

[45] It is common cause that the parties intended for further evidence to be lead in the matter. Further documents in this regard were discovered and exchanged shortly before the hearing. In this court's view, neither party would have been in a position to continue.

[46] This court has a discretion to grant a cost order that is reasonable and fair to both parties. As the postponement could not be placed at the feet of any specific party, it is this Court's view that each party should pay his / her own costs pertaining to the appearance on the 2nd of April 2024.

[47] As to the remaining costs, the Plaintiff is substantially successful in her case. There is no reason for the cost order not to follow the result.

<u>Order:</u>

[48] In the result the following order is made:

44.1 The marriage between the Plaintiff and the Defendant is hereby dissolved.

44.2 The division of the joint estate.

44.3 An order that an adjustment be affected in favour of the Plaintiff on division of the joint estate in an amount of R2 252 235.42.

44.4 That JACOB DE KLERK (SNR) Identity number: 4[…], an attorney duly admitted in the High Court of South Africa (North Gauteng High Court, Pretoria) practicing as such at the firm DE KLERK'S ATTORNEYS, 21 MARKET STREET, POLOKWANE, is appointed as liquidator of the joint estate which subsisted between the Plaintiff and the Defendant during their marriage with the powers and / or functions set out in Annexure 'A' hereto.

44.5 Both parties retain full parental responsibilities and rights with regard to the care of the minor child.

44.6 Primary care and residence of the minor child is awarded to the Defendant subject to the Plaintiff's right of reasonable access to the minor child.

44.7 The Defendant shall be responsible for the minor child's reasonable expenses. This does not affect the Plaintiff's liability to contribute towards the maintenance of the minor child in accordance with her means.

44.8 Both parties retain their parental responsibilities and rights with regard to the guardianship of the minor child.

44.9 The Defendant shall pay an amount of R12 000.00 (twelve thousand rand) per month rehabilitative maintenance for the Plaintiff from the 1st day of the month following the granting of the decree of divorce and thereafter on or before the first day of each successive month for a period of 18 months.

44.10 The Defendant shall pay the Plaintiff's costs, excluding the costs pertaining to the postponement of the trial on the 2nd of April 2024, on a scale as between party and party, inclusive of costs to counsel on Scale B.

44.11 Each party shall be responsible for his / her own costs pertaining to the postponement of the trial on the 2nd of April 2024.

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M BRESLER
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE PLAINTIFF	**:**	**Mrs. MC de Klerk**
INSTRUCTED BY	**:**	**DDKK Attorneys Inc** **mdk@ddkk.co.za**
FOR THE DEFENDANT	**:**	**Mr. JT Grobler**
INSTRUCTED BY	**:**	**Thomas Grobler Attorneys** **litigation1@tgprok.co.za**
DATE OF HEARING	**:**	**24 April 2024**
DATE OF JUDGMENT	**:**	**22 July 2024**