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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case number: 2019-86009

Date of hearing: 30 July 2025

Date delivered: 1 September 2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

~~(3) REVISED~~

DATE 1/9/25

SIGNATURE

In the application between:

V[...] M[...] P[...] M[...]

Applicant

and

C[...] N[...] -W[...]

First Respondent

DIVORCE SETTLEMENT SERVICES

Second Respondent

RUDOLF PHILLIPUS JORDAAN N.O.

Third Respondent

JUDGMENT

SWANEPOEL J:

Introduction

[1] The applicant seeks an order in terms of s 38 of the Superior Court Act, 10 of 2013 ("the Act"), that the report of the third respondent (a liquidator dated 23 August 2021 be adopted.

[2] Section 38 provides for the appointment of a referee to resolve disputes, and reads as follows:

“(1) In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer-

(a) any matter which requires extensive examination of documents or scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or

(b) any matter which relates wholly or in part to accounts; or

(c) any other matter arising in such proceedings, for enquiry and report to a referee, and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard to thereto as may be necessary or desirable.

[2] Any such report or part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question.”

[3] The applicant and the first respondent were previously married to one another in community of property, which marriage was dissolved by decree of divorce on 29 September 2020. In terms of a settlement agreement, the parties agreed to the appointment of a liquidator to determine the amount due to each party. The third respondent, who is employed by the second respondent, was duly appointed as the liquidator.

[4] Having consulted with both the applicant and the first respondent (I refer to the applicant and the respondents as “the parties” collectively), the liquidator prepared a provisional report. He called for

the parties' submissions on the report, and having considered the submissions, the liquidator brought out a final report on 23 August 2021, which concluded that the first respondent was indebted to the applicant in the sum of R 2 304 839.15. Although the first respondent indicated her unhappiness with the report, no review application was forthcoming.

These proceedings

[5] This matter was set down for hearing on 26 May 2025. On that date the first respondent's counsel did not appear, and I gave an order by default.

[6] On 27 May 2025 the first respondent's counsel appeared and submitted that she had been advised that the matter would be heard on 27 May. I consequently recalled my order of the previous day. The first respondent's counsel then advised that the first respondent would be seeking a postponement of the matter in order to file a counter-application seeking to review the liquidator's report. I stood the matter down to 29 May so that the first respondent could file papers in support of the postponement application. She did so on 28 May 2025. The postponement application was argued on 29 May, whereafter I dismissed the application with costs. The first respondent's counsel intimated that she was not ready to argue on the merits, and I stood the matter down further to 30 May in order for counsel to prepare. On 30 May the first respondent's counsel was indisposed, and, by agreement of the parties, I ordered that the first respondent could deliver heads of argument within three weeks if she so wished, that the applicant could answer thereto within a week, and that I would decide the matter on the papers.

The postponement application

[7] The main question that perplexed me was why the first respondent had not launched an application to review the report in the 3 years and nine months since the report was published. Despite the

voluminous papers delivered in the postponement application, that question remains unanswered. The timeline of the matter is important: On 23 August 2021 the report was published. On 10 September 2021 the first respondent wrote to the liquidator saying *“My understanding is that I now have 30 working days commencing from Monday 13th September to afford me the time to seek legal counsel to assist me in preparing the submission of the application for review.”* There can be no doubt whatsoever that the first respondent knew that there was a time period within which she was obliged to bring her application.

[8] On 18 October 2021 the liquidator wrote to the parties advising them that the period allowed for the review application had lapsed, and that he accepted that the parties agreed with, and had ratified the report. When the first respondent failed to respond to applicant’s demand for payment, the applicant launched this application on 18 November 2021. The first respondent delivered a notice to oppose on 30 November 2021. The first respondent’s answering affidavit was due on 21 December 2021 but was only delivered on 12 April 2022. It was thus delivered some three months out of time.

[9] Since the application was launched, there have been several applications brought by the parties. The first application was an ex parte application brought by the liquidator to freeze certain funds that the first respondent had paid to her husband’s bank account pursuant to a sale of an immovable property. The second application, brought by the first respondent and her husband on 2 December 2021 sought to unfreeze the bank account. The end result was that the funds required to settle the first respondent’s alleged indebtedness to the applicant were ringfenced.

[10] At the outset the liquidator was not cited in these papers. The first respondent then pointed out, correctly so, that the liquidator has a direct legal interest in the matter, and that he should have been cited from the outset. That issue was addressed when the applicant sought to join the

second and third respondents. Even that application became opposed by the first respondent, causing a further delay in the matter. The second and third respondents were eventually joined to the matter by court order on 11 November 2022.

[11] Finally, on 6 March 2024 the first respondent was ordered to deliver heads of argument within 10 days, which she failed to do. Consequently, the applicant brought a Rule 30A application for the striking of the first respondent's defence. That application was never set down, as the applicant elected to pursue the main application instead.

[12] It is within this context that one should consider the first respondent's explanation for the inordinate delay in bringing the counter-application. She says that on 28 April 2022 the parties held a roundtable meeting at which the matter could not be resolved. On 24 August 2022, almost four months later, the first respondent consulted with her counsel regarding the matter. Still, no review application was forthcoming.

[13] The first respondent says that she consulted with her legal team 'several times' during 2023. She does not say when these consultations occurred and what the outcome was. The fact is though, that despite these 'several' consultations, nothing was done in 2023 to advance the review application. By March 2024 the first respondent had not delivered her heads of argument, and it was necessary for her to be compelled to do so.

[14] On 16 April 2024, twenty months after the initial consultation, the first respondent's counsel forwarded a memorandum in which she expressed an opinion regarding the calculation of the sum due to the applicant. The applicant refused to accept the calculation, notwithstanding which the first respondent did nothing to advance the review. The only steps taken by the first respondent in furtherance of the litigation was to deliver an answering affidavit to the Rule 30A

application to compel her to deliver heads of argument, instead, as one would expect, of delivering the counter-application.

[15] The notice of set down for 26 May 2025 was served on the first respondent's attorney on 5 May 2025. The first respondent professes that her attorney did not realize, until 21 May 2025, that this application had been enrolled, when he received a proposed practice note from the applicant. By then the first respondent must have realized that the applicant was intent on continuing with this application, but still no review application was forthcoming.

[16] The first respondent took the view, erroneously so, that the application was premature and that the rule 30A application should be heard first, and her attorney refused to sign the joint practice note. I say that this view is erroneous as the applicant was entitled to forego the rule 30A application, and to elect to argue the matter on the current papers.

[17] It is my firm view that the only reason for the delay in launching the review application is that the first respondent never truly intended on doing so. Instead of focusing on the review, the first applicant has, over a period of almost four years, resorted to delaying tactics. In my view the latest attempt at a postponement is simply a continuation of the first respondent's attempt at delay. My view is fortified by the events that occurred subsequent to the hearing of the matter.

[18] It is trite that a party seeking an indulgence must fully explain the delay. The entire period of the delay must be dealt with.¹

[19] Conspicuously absent from the papers is any explanation for the delay in bringing the counter-application. The first respondent's submission that her attorney was busy with the other interlocutory applications, and that he could not attend to this application for some years, is rejected. The argument that the first respondent was looking

for documents to prove her case, is similarly rejected. If the first respondent has been unable to find documents relating to her own financial affairs for almost four years, then it is safe to say that those documents do not exist.

[20] In considering the application for a postponement, I also take into consideration the merit, or rather, lack thereof in the first respondent's case.

Subsequent proceedings

[21] When the first respondent's counsel became ill-disposed on 30 May 2025, I adjourned the matter down so that the first respondent could file heads of argument, and so that the applicant could reply. However, on 24 June 2025 the first respondent sought leave to file a supplementary affidavit. I agreed to hear further oral argument on the matter, which I did on 30 July 2025.

[22] The first respondent's explanation for the late filing of the supplementary affidavit was the following:

"The delay in bringing this application was not as a result of any mala fides. Information came to light post the filing of the answering affidavit and some information was disclosed very recently. I am advised that my counsel also, having considered the matter again on Sunday 22 June 2025 whilst drafting my heads of argument, saw that a supplementary affidavit would be the best way to address relevant issues and put the necessary information before the Honourable Court."

[23] The affidavit is silent on what information came to light, when it came to light, what information was disclosed, by whom and when. The first respondent has been represented by an attorney and junior counsel, and has consulted with senior counsel. It would be very surprising if they left any stone unturned to uncover relevant evidence

and to present it to Court timeously. The explanation did not truly explain the delay.

[24] Furthermore, the applicant is entitled to have the case heard expeditiously, and without the undue and inordinate delays as have been caused by the first respondent. Litigation is not a game, and parties should not flout the rules as they wish. Only when a delay is truly explained, and it is in the interests of justice to allow a deviation from the rules, is it appropriate to do so. That was not the case in this matter, in my view, which is why I refused the application to supplement the first respondent's papers. As an aside, I point out that I also did not read the applicant's supplementary affidavit, as there had not been an application to supplement, and the applicant could not, as of right, rely on a supplementary affidavit.

Merits

[25] The answering affidavit was delivered some 6 months after the application was launched, and nine months after the report was published. One would have expected the first respondent to have been able to put up a detailed case for her alleged objection to the report. Instead, one finds generalized statements only; for instance that the first respondent wishes to raise 'important considerations', and that she 'disagreed' with the report. What those 'considerations' or disagreements might be is not clarified. The first respondent simply says that:

"It is however denied that the calculation of my allocation account was effected correctly, more specifically as, amongst other things, certain amounts and items which were expressly to be excluded from the calculation as per the settlement agreement that was made an order of court when the applicant divorced.... Were included, without justification and/or sufficient justification therefor in light of the terms of the settlement agreement and the prevailing circumstances."

[26] The only objection with some form of substance is the first respondent's averment that the liquidator took into account policies and investments in his calculation which were specifically to be excluded, and the assets were to be retained by the party in whose name the investment, policy or share was held. This contention arises from two clauses in the settlement agreement.

[27] Clause 31 provides that each party shall retain their own annuities, pension fund benefits, shares, life policies and investments in their own name. Clause 34 provides that only the assets therein named, namely the equity value of the immovable properties, a R 400 000 loan on a Meyerspark property, the defendant's severance package, as well as any assets of which the other party was not aware might be taken into account in the division of the estate.

[28] The first respondent says that the liquidator took into account investments in her name of which the applicant had been aware, and which should, consequently, not have been taken into account.

[29] Having perused all of the correspondence provided to him, the liquidator dealt with these assets in the report as follows:

"Both parties have submitted that the other party had not disclosed their investments, policies and shares, and both parties have submitted that they have disclosed their investments policies and shares. It is not clear and as I cannot with surety state, on the documentation at hand, and to my knowledge, that both parties were fully aware of the other parties' investments, policies and shares held, and the values thereof, and can I not exclude/include one parties' investments, policies and shares but not the other. I will include the stated assets for purposes of this report."(sic)

[30] In an email to the liquidator dated 25 May 2022 the first respondent contended that she had advised the applicant of her

investments in an email dated 20 November 2018. She said that the alleged email was attached to the 25 May email, but that is not evident from these papers. In any event, the 25 May email was sent many months after the report had been published. It does not prove that the applicant was aware of the first respondent's investments, nor that the first respondent had so informed the liquidator. In these papers the first respondent also did not provide any evidence to substantiate her contention that the applicant had been aware of these particular assets.

[31] In *Wright v Wright*² the Supreme Court of Appeal considered the functions of a referee under section 38 of the Act, and the status of the report. It said:

"I agree with the learned judge's finding that Estate Young is authority for the proposition that 'a court is bound by the findings of a referee contemplated in s 19*bis*, unless it can be found that the conclusions arrived at by the referee were unreasonable, irregular or wrong.'" (my emphasis)

[32] With regard to *Perdikis v Jamieson*³ the Court held that:

"In this regard, the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:

'It was held in *Bekker v RSA Factors* 1983 (4) SA 568 (T) that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.'

This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds."

[33] The *onus* to show that the report should not be adopted is upon the first respondent. She has not disclosed any reason whatsoever to impugn the factual findings in the report. There is no evidence that the liquidator's findings regarding the inclusion of the investments, policies

and shares in the calculation of the amounts due were wrong, irregular or unreasonable. I find, therefore, that the report should be adopted.

[34] I make the following order:

[34.1] The final report by the third respondent dated 23 August 2021 is adopted in terms of section 38 of the Superior Courts Act, 2013.

[34.2] The first respondent shall pay the applicant the sum of R 2 304 439.15 within seven days of this order.

[34.3] The applicant and the first respondent shall each pay 50% of the cost of the second and third respondents associated with their mandate arising from the order of court dated 29 September 2020, within 7 days of this order.

[34.4] The applicant shall pay the second and third respondent's costs in respect of the application for leave to intervene.

[34.5] Save as above, the first respondent shall pay the costs of the application on Scale C.

**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

Counsel for the applicant:

Adv. F Kriel

Instructed by:

Du Toit's Attorneys

Counsel for the respondent:

Adv. B Bhabha

Instructed by:

Ningiza Horner Inc

Heard on:

30 May 2025

Judgment on:

1 September 2025

¹ Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC)

² 2015 (1) SA 262 (SCA) at para 8

³ Perdikis v Jamieson 2002 (6) SA 356 (W)