IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 24100/2020

(1) REPORTABLE: NO

(2) OF INTEREST TO THE JUDGES: NO

(3) REVISED: NO

DATE: 16 SEPTEMBER 2025

SIGNATURE:

In the matter between: -

J[...] J[...] T[...] **APPLICANT**

(I.D NUMBER: 6[…])

And

M[...] S[...] T[...] **RESPONDENT**

(I.D NUMBER: 7[…])

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 16 September 2025.

JUDGMENT

COLLIS J

Introduction

1] This is an opposed application in terms of Rule 42(1) of the Uniform Rules of Court for an order varying a decree of divorce granted by Munzhelele J on 12 April 2023.[1]

2] The respondent opposed the application and in addition launched a counterapplication for the appointment of a liquidator. The counterapplication is also opposed by the applicant.[2]

Background

3] The parties before court were previously married to each other in community of property. Their marriage relationship had broken down irretrievably resulting in the respondent issuing summons for divorce proceedings.[3]

4] The applicant was the defendant in the divorce action, and he defended the divorce proceedings by delivering a plea and counterclaim.[4]

5] After close of pleadings, the applicant failed to sign a pre-trial minute, despite being compelled to do so by an order of court.[5]

6] As a result of this failure by the applicant and the applicant's non-compliance of a subsequent contempt order, the respondent brought an application for an order striking out the applicant's defense and counterclaim.

7] On 20 January 2023, this order was granted and the divorce thereafter proceeded on an undefended basis.[6]

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[1] Notice of motion, p TI-T2; Decree of divorce, p T9.
[2] Notice of counterapplication, p T2-T3; Applicant's Replying affidavit to the Respondent's counterapplication, p T3-3 to T3-4.
[3] Combined summons, p A1-A3.
[4] Plea and Counterclaim, A120A19.
[5] Compel order: 17 June 2022, p Q1.
[6] Striking out order: 20 January 2023-p Q3.

8] The decree of divorce so granted, specifically provided for the division of the parties' joint estate, which includes but is not limited to, the respondents' pension interest in the Government Employees Pension Fund, of which the applicant is a member.

Issues to be decided

9] In the present application, this Court was called upon to decide the following:

9.1 whether the applicant has made out a case for the variation of the divorce decree or differently put whether the omission of the applicant's pension interest from the divorce order constitutes a patent error or omission capable of correction or variation;

9.2 whether a liquidator should be appointed for the purposes of division the joint estate of the parties; and

9.3 a determination as to who should be ordered to pay the costs of both the main and counterapplication.

10] To the matter at hand the respondent took issue with the late delivery of the Relying affidavit without condonation being sought simultaneously. This is so, as the Answering affidavit was served on the applicant's attorney on 16 August 2024,[7] but that the Replying affidavit to the main application and Answering affidavit the counterapplication was only served on the respondent's attorney on or about 29 April 2025, this some eight months later.

11] As the applicant did not seek condonation for the late delivery of his respective replying and answering affidavits, counsel for the respondent contended that the filing of these affidavits in the absence of seeking condonation for its delivery outside the permissible time frames allowed by the rules should be regarded as irregular and falls to be disregarded by the Court.

[7] Proof of service in respect of answering affidavit, p T2-1.

12] Rule 6 of the Uniform Rules of Court sets out the time frames for the delivery of affidavits and absent compliance with these time frames, a litigant is required to seek condonation in terms of Rule 27, which the applicant herein has failed to do.

13] In the absence of such condonation, this Court is deprived of being given the benefit of an explanation on good cause shown, explaining the lateness for the delivery of such affidavits.

14] Given that no condonation has been applied for and none has been granted, this Court as a result, will proceed to consider the merits of both the main application and the counterapplication without having regard to such affidavits.

15] The effect thereof is that the applicant has failed to dispute the allegations made by the respondent in her answering affidavit to the main application and so too the applicant has failed to dispute the facts set out by the respondent in support of her counterapplication. Consequently, these facts would generally be accepted as true.[8]

16] As previously mentioned, the crux of the dispute between the parties, turns around the decree of divorce granted and more specifically the order made by the court in relation to the division of the joint estate of the parties.[9]

17] In this regard the Divorce Act, 70 of 1979 ('the Act') and more specifically section 7(7) and 7 (8), is of relevance and reads as follows:

> "(7)(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.
>
> (b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-
>
> (i) was paid over or awarded to another party; or

[8] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd 1984 (3) SA 623 (A).
[9] Annexure A: Decree of divorce, p T9.

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) …..

(8) Notwithstanding the provisions of any other law or of the rules any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to the other party and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;

(b) ……"

18] Section 1(1) of the Act defines the term 'pension interest' as follows:

'Pension interest', in relation to a party to a divorce action who-

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) …..'

19] In terms of section 7(7) of the Divorce Act it provides that, for the purpose of determining the patrimonial benefits to which the parties are entitled upon divorce, the pension interest of a member spouse is deemed to form part of the joint estate and must be shared accordingly between the parties.

20] Therefore, by operation of law, the pension interest of the member spouse as at date of divorce is deemed to form part of the parties' joint estate for the purpose of determining the parties' patrimonial benefits and division thereof, and as such no specific order is required in terms of s 7(7)(a).[10]

21] The joint estate of the parties thus necessarily includes the pension interest of either party as contemplated in s 7(7)(a) of the Act and falls to divided, together with the remainder of the parties' joint estate, at the hands of the liquidator to be appointed to assist the parties in making their determination.

22] It is on this basis that the respondent contends that no specific reference in the divorce decree so issued needed to be made by Munzhelele J, as by operation of law, the pension interest of a member spouse as at date of divorce forms part of the joint estate.

23] As per the founding affidavit, the applicant merely asserts that there was an omission made in the decree of divorce to mention one party's pension interest while not referring to the others.[11]

24] It is significant that the founding affidavit does not allege that this omission was a mistake or error which warrants a variation to be made by this court.

25] As already mentioned, the divorce order was granted unopposed as the applicant's defense had been struck out and in the absence of any rebuttal, this Court must accept the version of the respondent asserted before this Court.

24] Our Courts have further recognized that failure to specifically mention a pension interest while ordering division of the joint estate does not mean the pension will be excluded and in circumstances where the parties are married in community of property, each spouse is automatically entitled to 50 % of the joint estate, including the other's pension interest, unless excluded by agreement or specific court order. In the present matter this had not been the position.

[10] Ndaba v Ndaba 2017 (1) SA 342 (SCA).
[11] Founding Affidavit para 3.3 page T6

25] Therefore, the failure to explicitly refer to one party's pension interest in the divorce decree particularly where the other party's pension interest is mentioned is not a prima facie indication of a patent error, especially where both parties had pension interests.

26] On this basis, this Court is not persuaded that a variation of the divorce decree is warranted in terms of rule 42(1) and consequently the application is dismissed with costs.

27] As per the counterapplication the respondent seeks the appointment of a liquidator of the joint estate of the parties. This is so as the applicant has been in occupation of the parties jointly owned immovable property since 2018 and the respondent has derived no benefit from the property, despite being jointly liable for the expenses and debts in relation to the property.[12]

28] As the parties cannot agree on how to divide their joint estate and there is no prospect of them reaching agreement on this aspect, either one of them or both of them, may approach the courts for the appointment of a receiver and liquidator.[13]

29] This is precisely the step taken by the respondent in the present case and the court assessing such request will exercise a discretion having regard to the nature of the estate and the extent of the dispute as to the division.

Appointment of liquidator

30] In considering an application for the appointment for a liquidator there are at least two considerations to be taken into account by the court:

> 30.1 The joint estate must be of such a nature that it justifies the appointment of a Liquidator;[14] and

[12] Para 9.2 of the answering affidavit, p T2-7; Para 21.1 of the answering affidavit, p T2-11.
[13] Para 6 of the answering affidavit, p T2-6, Para 9 of the answering affidavit, p T2- 7; Para 11 of the answering affidavit, p T2-9.

30.2 the parties must be unable to reach an agreement regarding the manner of division/termination of the jointly owned assets.

31] The matter of Revill v Revill[15] is apposite in this regard wherein it was held that:

'In my opinion… the Applicant is entitled to move this court for the appointment of a receiver, unless the Respondent agrees with the Applicant in regard to the appointment of a receiver.'

32] In the same matter it was further held that:

'The true position is that no man can be a judge in his own cause. In other words, neither party can take upon himself or herself the right to divide the joint estate. In fact, no party in any form of community is entitled to divide the common property and the other party be forced to accept that position. Once either of the parties has no faith in the bona fides of the other party he is entitled to demand the appointment of a receiver.'[16]

33] In Gillingham v Gillingham, Innes CJ held as follows:[17]

"The law governing this matter seems to me perfectly clear. When two persons are married in community of property a universal partnership in all goods is established between them. When a court of competent jurisdiction grounds a decree of divorce that partnership ceases. The question then arises, who is to administer what was originally the joint property, in respect of which both spouses continue to have rights? As a general rule there is no practical difficulty, because the parties agree upon a division of the estate, and generally the husband remains in possession pending such division. But where they do not agree the duty devolves upon the Court to divide the estate,

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[14] Schoeman v Rokeby Farming Co (Pty)Ltd 1972 (4) SA 201 (N) at 206D-G.
[15] 1969 (1) CPD 325 at 326C-D.
[16] 326 E-F.
[17] 1904 TS 609.

and the Court has power to a point some person to effect the division on its behalf. Under the general powers which the Court has to appoint curators it may nominate and empower someone (whether he is called liquidator, receiver, or curator…) to collect, realise, and divide the estate. And that that has been the practise in South African courts is clear."

34] In the matter P v P[18] it was held that:

"In Van Onselen NO v Kgengwenyane Comrie J said that in exercising the power to divide the joint estate, or to supervise its division, the courts tended to apply the rules developed for the dissolution of commercial partnerships. It seems plain that in the absence of agreement between the parties the court will appoint a liquidator without inquiring why the parties have not agreed on a division. It is the absence of an agreement that is relevant, not whether the parties have made a good enough effort it to agree."

35] As already mentioned, *in casu* the parties are unable to reach an agreement regarding the manner in which their jointly owned property is to be divided. Given this reason, either of the parties would be entitled to apply to Court for the appointment of a liquidator and this is the precise step elected by the respondent.

36] Once so appointed, the liquidator in order for a joint estate to be divided equally, would first have to determine the net value of the joint estate. This is done by deducting all liabilities from their assets.

37] Once the net value of the joint estate is determined, division thereof normally takes place by [1] Dividing the assets physically, and/or [2] selling the assets and dividing the proceeds and/or [3] offsetting assets against others.

38] On behalf of the respondent it was submitted that the abovementioned process cannot take place fairly if the applicant is allowed to withdraw money from the respondents' pension fund, particularly under circumstances where the

[18] [2016] ZAFSHC 13.

respondent is unable to ascertain whether the applicant has paid the bond and other expenses in respect of the parties jointly owned immovable property.

39] As the answering affidavit to the counterapplication had been disallowed, no rebuttal evidence has been placed before this Court and consequently the respondent is entitled to seek the appointment of a liquidator to facilitate the division of the joint estate as of right.

40] Such an appointment will facilitate and secure the equal division of the parties' joint estate as ordered by the court on 12 April 2023.

Costs

41] As to the costs to be awarded in respect of the counterapplication, the respondent is the successful party and therefore, costs should follow the result.

Order

42] The main application is dismissed with costs, including costs of counsel on scale B.

43] In respect of the counterapplication:

43.1 Mr. Phillip Jordaan, of Divorce Settlement Services, or a person to be determined by the above Honourable Court, is appointed as receiver and/or curator and/or liquidator of the joint estate of the above parties with the powers and duties as appear from annexure "MT3" annexed hereto.

43.2 The costs associated with the appointment and carrying out of the functions of the liquidator to be costs in the liquidation of the parties' joint estate.

43.3 The respondent is further ordered to pay the costs of the counterapplication unsuccessfully opposed on scale B.

C. COLLIS

JUDGE OF THE HIGH COURT

GAUTENG DIVISION PRETORIA

APPEARANCES

Counsel for the Applicant:	Adv. A.E.B Koalepe
Instructed By:	Messrs Serabele NL Attorneys
Counsel for the Respondent:	Adv. Z. Marx du Plessis
Instructed By:	Shapiro & Ledwaba Inc.

Date of Hearing:	24 July 2025
Date of Judgment:	16 September 2025

"MT3"

POWERS AND DUTIES OF LIQUIDATOR:

1. The Liquidator shall take control over the joint estate and shall enjoy all the powers as administrator hereof. Without derogating from the generality of a foregoing, the Liquidator shall also be entitled:

1.1 to accumulate details of all the assets, movable or immovable assets, tangible or intangible which form part of the joint estate;

1.2 to accumulate details of all liabilities of the joint estate;

1.3 to make all investigations necessary and in particular to obtain from the parties all information with regard to the assets and liabilities of the joint estate;

1.4 to obtain information and copies regarding the financial affairs of the parties, including bank accounts, bank statements and but not limited to any information or interest relating to or interest in any long-term insurance policy, collective investment scheme, endowment policies, annuity policies and retirement annuity policies or any other financial products or services, from bank managers and/or managers of any long-term insurance, unit trust manager or any other financial institution, which includes all insurance companies and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum, Professional Provident Fund (PPS) with regard to the assets and liabilities of the joint estate;

1.5 to obtain information and/or balance sheets and copies from the auditors or any other person but not limited to any information or interest relating to or interest in any long-term insurance policy, collective investment scheme, endowment policies, annuity policies and retirement annuity policies or any other financial products or services, from bank managers and/or managers of any long-term insurance, unit trust manager or any other financial institution, which includes all insurance companies and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum, Professional Provident Fund (PPS), who may have knowledge of the financial affairs of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest;

1.6 to obtain information and copies of the financial statements of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or the joint estate of the parties may have an interest;

1.7 to inspect the books of accounts of any companies, close corporations, trusts or businesses in which the Plaintiff, the Defendant and/or joint estate of the parties may have an interest;

1.8 to physically inspect the assets of the joint estate and to compile a full inventory of all the assets referred to in paragraph 1.1 above;

1.9 to obtain sworn valuations of all the assets referred to in paragraph 1.1 above of which costs will be for the account of the joint estate;

1.10 to interrogate or interview the Plaintiff and the Defendant and any other person in order to give effect to paragraphs 1.1 and 1.2 above;

1.11 to subpoena the Plaintiff, the Defendant and witnesses out of the above the appropriate forum for purposes of interviewing and/or interrogating such persons at a date, place and time to be determined by the Liquidator and to ensure that the proceedings in terms hereof are recorded in order to give effect to paragraphs 1.1 and 1.2 above;

1.12 to inspect all books, vouchers, cheques, deposit slips, bank statements and, in general, all documents in possession of any person, for the purposes of giving effect to paragraphs 1.1 and 1.2 above;

1.13 to make and retain copies, at his discretion, of all the documents and books referred to in paragraph 1.12 above;

1.14 to submit, after completion of his duties referred to in paragraphs 1.1 to 1.13 above, a full report of his investigations to both the Plaintiff and the Defendant;

1.15 to distribute the nett assets of the joint estate in accordance with paragraphs 2 and 3 hereunder between the Plaintiff and the Defendant on such basis as may be agreed upon between them, alternatively if no such agreement can be reached, to sell the assets of the joint estate either by public auction or private treaty (the Plaintiff and the Defendant having a right also to bid) and thereupon to divide the nett proceeds between the Plaintiff and the Defendant in accordance with the paragraphs 2 and 3 hereunder;

1.16 to engage the services of any suitable qualified person or persons to assist him in determining the proper value or whereabouts of any of the assets of the joint estate and to pay such person or persons the reasonable fees which may be charged by him;

1.17 to afford both the Plaintiff and the Defendant personally the opportunity to make recommendations to him about any matter relevant to his duties and to this order and to the identity of any purchaser as well as the purchase price of any asset, including, but no necessarily limited to:

1.17.1 the time and/or manner in which any assets shall be realised;
1.17.2 the price for which any assets should be realised; and
1.17.3 the sequence in which any assets should be realised;

1.18 to give due consideration to the wishes of the parties pursuant to the representations made by them and make such decisions in respect thereof as he may deem fit;

1.19 to sell any assets to either the Plaintiff or the Defendant for a price that he deems to be the true market price of such assets;

1.20 to sign any documents as may be necessary to effect the transfer of any assets sold from the person in whose name it is registered to the purchaser thereof;

1.21 not to realise any movable assets excluding shares, unit trusts and insurance policies without giving both the Plaintiff and the Defendant ten days' notice of his intention to do so;

1.22 to give both parties a first right to purchase any such assets as envisaged in paragraph 1.21, in the case of sale by treaty at the same price he is able to obtain from a bona tide third party, or in the case of a public auction, at a better price than that offered by a bona tide third party;

1.23 to apply to the appropriate forum for any further directions as he shall or may consider necessary;

1.24 to institute legal proceedings against any persons for the delivery to him of any assets, deeds or documents of the joint estate in whatever Court it shall be appropriate to bring such proceedings;

1.25 to instruct and appoint attorneys and/or counsel to institute proceedings on his behalf for the for the purposes of obtaining delivery of any assets alleged to be vested in the joint estate and to obtain such other or alternative relief as the circumstances may require, the costs of Counsel and/or attorneys to be paid by the joint estate in accordance with the principals enounced in *Muller v The Master and Others, 1992 (4) SA 277 (T)*;

1.26 to collect debts due to the joint estate unless the same be disposed of by sale;

1.27 to defend any action launched against the joint estate;

1.28 to pay the liabilities of the joint estate;

1.29 to pay his reasonable fees and to apportion such fees between the parties in the same proportion as they are entitled to the assets of the joint estate;

1.30 to direct in terms of Section 7 (8) of the Divorce Act No. 70 of 1979 that a portion not exceeding 50% of a party's pension interest as at date of divorce be paid to the other party as and when the pension benefits accrue to the party entitled to these and to require the pension fund concerned to endorse its records accordingly;

1.31 to obtain full particulars of all the Plaintiffs and the Defendant's insurance policies from all insurance companies which includes and not limited to the following insurance companies, Old Mutual, Liberty, Metropolitan, Sanlam, Discovery, Momentum, Professional Provident Fund (PPS) including but not limited to life policies, endowment policies, annuity policies and retirement annuity policies from the underwriters thereof, alternatively from such underwriters' duly authorised agents and to deal with such policies in his discretion in order to enable the Liquidator to give effect to the provisions of paragraphs 2 and 3 below;

1.32 to instruct banks and/or financial institutions to deal with investments and bank accounts as the Liquidator may in his discretion deem necessary in order to protect the rights of one of the parties or both parties in order to give effect to the provisions of paragraphs 2 and 3 below;

1.33 to allocate, in his discretion, both assets and liabilities between the parties.

2. The division of the nett assets referred to in paragraph 1.15 above shall be subject to the protection of the rights and claim of secured and preferent creditors of the joint estate.

3. The division of the nett assets referred to in paragraph 1.15 above shall be in equal proportions between the Plaintiff and the Defendant.

4. Any losses suffered by the joint estate as a result of the wrongful behaviour of the parties in dissipating the joint estate's assets, shall be borne exclusively by such party and a distribution and division of the assets of the joint estate or the proceeds thereof, as the case may be, shall accordingly be subject to adjustment in accordance with the Liquidator's discretion.

5. The Liquidator is not required to find security of his administration.