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IN THE REPUBLIC OF SOUTH AFRICA



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

CASE NO: 35402/09

(1) REPORTABLE: NO / YES

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

(3) REVISED.

(4) SIGNATURE: N Khumalo J

DATE: 02/10/2025

Electronically delivered

In the matter between

M[...] L[...] K[...]

APPLICANT

and

RUDOLPH PHILLIPUS JORDAAN

1ST RESPONDENT

M[...] O[...] M[...]

2ND RESPONDENT

‘This judgment was handed down electronically by circulation to the parties’ representatives by email. The date and time of hand-down is deemed to be **02 October 2025**

The appointment of a liquidator to effect or implement the division or separation of a matrimonial joint estate at a dissolution of a marriage is a common occurrence especially where a huge estate is involved¹ or the parties are not in agreement on its separation. The parties may agree on the liquidator to be appointed or absent such an agreement a court may, exercising its inherent power appoint one.² The powers that are bestowed on the Liquidator as an administrator authorises him to take control of the joint estate, accumulate the assets together with the liabilities to ultimately dissolve the joint estate through a fair distribution of the net assets between the divorcees.

JUDGMENT

N V KHUMALO J

[1] This is an application for the removal of Mr Rudolph Pillipus Jordaan, the 1st Respondent as an appointed liquidator and receiver in the joint estate of the Applicant, Mr M L K[...] and his ex-wife Ms M O M [...], the 2nd Respondent. The Applicant also seeks the report of the 1st Respondent on the division of their joint estate to be set aside, the fees charged by the 1st Respondent forfeited and the appointment of Ms Maryna Estelle Simons in substitution of the 1st Respondent.

Factual Background

[2] The Applicant and the 2nd Respondent were previously married to each other in community of property (together referred to as the parties). Their marriage was dissolved by an order for the decree of divorce and division of the joint estate obtained by the 2nd Respondent on 14 September 2009 by default, without the knowledge of the Applicant. On 13 November 2017, eight years later, the 1st

¹ In *Schoeman v Rokely Farming Co (Pty) Ltd* the court found that there was no practical purpose for the appointment of a liquidator. There were no difficulty with regard to capital contributions and the partnership was of a very restricted nature.

² *Gillingham v. Gillingham*, 1904 T.S. 609 where INNES C.J., stated: 'But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint 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-perhaps curator is the better word) to collect, realise, and divide the estate.'

Respondent was on application by the 2nd Respondent, appointed as liquidator and receiver mandated to oversee the division of their joint estate.

[3] In fulfilling his ultimate mandate, the 1st Respondent was in terms of the general powers and duties of a liquidator bestowed on him, to collate the joint estate assets, determine their value and or realise them for the purpose of its division. He was in addition thereto, in terms of a special order, to investigate the issue of a mortgage bond registered in favour of the Standard Bank of South Africa against the title deed of the immovable property in the joint estate, to determine what transpired in respect thereof, and in the event of the 1st Respondent finding that the joint estate of the parties suffered a loss as a result of the Applicant's conduct in respect thereof, to make an adjustment in favour of the Applicant in respect thereof.

[4] The immovable property in the joint estate is situated within the Westbrooke Estates, Roodepoort, ("the property" or "Westbrooke property"). The property was purchased as a vacant land for an amount of R550 000 by the Applicant during the subsistence of the marriage and registered only in his name on 21 December 2007. The Applicant later built a house on the property. The couple moved into the property post their divorce unbeknown to the Applicant that their marriage was already dissolved on 14 September 2009. The Applicant registered the Standard Bank bond after they have moved into the property. For division of the joint estate the 1st Respondent needed to establish the value of the property as at date of divorce.

[5] The parties have reached a deadlock. They differ on what was the state of the building at date of divorce and thus do not agree on the value to be attached to the property for the purpose of the division of the joint estate. Applicant alleges that at date of divorce, the property was still a vacant stand. The 2nd Respondent on the other hand alleges that on that date, the building or the construction of a house was complete and in agreement with a valuation of the property at R2 200 000.00 obtained by the 1st Respondent from Root X subsequent to his appointment in 2018.

[6] The 1st Respondent prepared his 1st report after receipt of statements of assets and liabilities together with supporting documents from both parties and submissions made on their behalf. Applicant's documents included reports from

experts, Municipality officials, the Home Owners Association and some collated by the 1st Respondent on his own, not being satisfied with some of the information submitted, including the current valuation of the property after which he prepared his provisional and final report.

[7] The Applicant rejected the 1st Respondent's reports contesting the conclusion the 1st Respondent made based on the Root X evaluation of the property and other assets in the joint estate as well as the suggested distribution of 50% thereof. The Applicant is also dissatisfied with the way 1st Respondent went about fulfilling his mandate. He accuses the 1st Respondent of biased and delay, hence he seeks 1st Respondent's removal and his final report to be set aside. He alleges that the 1st Respondent as an agent of the 2nd Respondent is doing everything in his power to see to it that the 2nd Respondent obtains a benefit she is not entitled to. Accordingly the final report that was received in February 2022 from 1st Respondent is leaning towards favouring the 2nd Respondent and therefore should be rejected.

[8] The Applicant further alleges to have become aware that the 1st Respondent was extremely and completely biased in favour of the 2nd Respondent on receipt of the July 2018 report. This is so since the 1st Respondent was approached by the 2nd Respondent's attorneys with preconceived instructions and ideas to act in the capacity of a liquidator. He also had a problem with the reasoning in the 1st Respondent's reports, and the manner in which the 1st Respondent wanted to go about exercising his mandate in fulfilment of his duties.

[9] The Applicant accuses the 1st Respondent to have persisted with his behaviour notwithstanding his attorneys sending a further letter to the 1st Respondent on 15 April 2019. He further accuses the 1st Respondent to have always known of his shortcomings and flaws in relation to the valuation of the property since the date of the letter, but to have nevertheless in dereliction of his court assigned duties refused to accept the various reports, including those from officials of the Johannesburg metro, various independent experts, civil engineers and certificates issued by inspectors in respect of the building status in September 2009. He accordingly regards the 1st Respondent to be biased and his true agenda to involve favouring the 2nd Respondent.

[10] The Applicant argues that the 1st Respondent's final report ignores all the correspondence and proof by every legal measure and from all logical reasoning, as the 1st Respondent has got only one purpose in this matter, that is to benefit the 2nd Respondent. As a result, the 1st Respondent has been dragging his feet since September 2019 not finalizing this matter and had refused to make up his mind when he was confronted with the truth. His attorneys finally received the 1st Respondent's correspondence with an amended provisional report on 27 September 2021 with nothing much in it. It is apparent in the report that the 1st Respondent continues to ignore the overwhelming evidence that proves that he is wrong in his valuations and assumptions. He is also trying to evade his duties and refuses to concede his mistakes.

[11] Applicant points out that the 1st Respondent refused an opportunity to resign or amend his report accordingly, which he was afforded by his attorneys in March 2022, following his final report. The 1st Respondent nevertheless persisted with his final report with a flawed statement of account still based on an incorrect valuation of R2 200 000.00. He failed not only to make an effort to establish the value of the property owned by the 2nd Respondent but also refused to obtain a value of the 2nd Respondent's pension fund as at date of divorce. The 1st Respondent ignored the credit that is supposed to come to him and simply assigned some or other arbitrary values.

[12] He consequently approached a Ms Maryna Estelle Symes from Zebra Insolvency, a well-known liquidator and receiver who has been practicing as such for many years. Ms Symes has consented to act as liquidator in replacement of the 1st Respondent. He lists the powers he seeks Ms Symes to exercise.

[13] The Applicant accordingly implores the court that:

[13.1] He will suffer irreparable prejudice and harm if the 1st Respondent is allowed to continue with his duties as he was willing to threaten the Applicant with the sale of Willowbrook property in 2019 before his attorneys were on record.

[13.2] The 1st Respondent should not be entitled to claim any fees in respect of this matter since he has been acting in a preconceived manner. He did not have to take charge of any fixed property or any bank accounts and did not open any kind of bank account anywhere in respect of the estate and as such he has had no real expenses. He instead decided on the face of overwhelming evidence to embark on a fruitless and pointless exercise to try and prove his preconceived ideas about the state of completion of the property at Willowbrook as at date of divorce.

[13.3] The facts that were presented to the 1st Respondent in 2018 were very clear and self-explanatory yet he decided to drag out the compilation of a report for four years to try and somehow justify an undue benefit to the 2nd Respondent.

[13.4] The lengths to which the 1st Respondent has gone to try and prove the impossible speaks volumes as to his true motives and the way he became appointed. He would have brought this application much earlier had the report been finalised but this was only done now, eventually completed in February of 2022.

[13.5] He submits that once biased is found and even if it is only a subjective opinion of one of the parties, no person should be allowed to act as liquidator. The way in which the 1st Respondent is clinging to his appointment and the powers afforded to him under the order of November 2017 further proves the prejudice that he will suffer at the 1st Respondent's hands if he is not removed and a neutral objective liquidator takes over this matter.

[13.6] The excuse of the 1st Respondent in his report of February 2022 that he cannot cross examine parties is absolutely untrue. The certificates issued by independent experts prove that there was no construction on the property at Willowbrook on the date of divorce. Despite the overwhelming evidence the 1st Respondent clings to his version of events because that is the purpose he was appointed for, in the first place.

[14] Based on all these accusations the Applicant submits that it is in the interests of justice that the order be granted as prayed for in the Notice of Motion

1st Respondent's answer

[15] All the allegations made by the Applicant against the 1st Respondent are denounced by the 1st Respondent as being baseless. He denies being biased against the Applicant but points out that the Applicant is uncooperative, willfully refuses to cooperate with the process as requested to do.

On the fulfillment of his duties

[16] He confirmed that he received from both the Applicant and the 2nd Respondent the asset and liability statements. The November 2009 Willowbrooke Municipality account statement indicated the market value of the property to be R1 080 000.00, and utilities to be R12 0000 in arrears. In fulfillment of his mandate he obtained valuations from Root X for all the property in the joint estate. The immovable property was valued at R2 200 000.00 and to be comprised of 5 bedrooms, 3 bathrooms, 2 Lounges, a Guest toilet, kitchen with pantry, scullery and lock up garages. He noted that the Applicant seems to suggest that the whole structure built on the vacant land was started and completed between 15 September and November 2009. Whilst his opinion concluded from reading the certificates received from the Applicant and the valuation report, is that the construction of the property ought to have been completed or at an advanced stage at date of divorce.

[17] He received responses on his 1st report of 9 May 2018 from both parties by 28 May 2018. The Applicant was not satisfied with the report, he disputed the Root X valuation on the complete structure, unless valued as a vacant stand at the date of divorce. The 2nd Respondent's submission on the other hand was that the building was already complete on date of divorce, *and they moved in as early as December 2009*. In the report he had called for a party that disagrees with his valuation to submit alternative evaluations within 30 days of receipt of the report.

[18] On 31 May 2018, the Applicant submitted a one pager valuation that reads, “17 December 2017, market value as at 15 September 2009” as if the property was a vacant serviced stand”. The 1st Respondent did not agree with the Applicant that the valuation shows the property to have been a vacant stand on date of divorce, on the basis that it is a retrospective estimation had the property been a vacant stand at date of divorce. The 2nd Respondent on the other hand submitted a screen shot of a facebook post by the Applicant’s son dated 11 December 2009, showing a photograph of a fully built structure on the property. He later received the real photo in February 2021. He had taken into consideration that the photo was taken in December 2009 and when comparing it with a picture taken in 2018, the indication is that in 2009 at date of divorce there was at least a structure.

[19] He responded to both parties’ submissions indicating that the improvements resulted in the property being evaluated at R2 200 000.00. *“This according to him implies that there was an extensive capital applied in the improvement of the structure after date of divorce, however, no proof of such has been received”*. He therefore could not comment any further on that aspect. He asked the Applicant to submit documentary proof of the funds applied and invoices of the expenses incurred to substantiate the Applicant’s allegations that at date of divorce there was no structure, the expenditure on the construction commenced thereafter.

[20] The Applicant’s response on 23 August 2018 was a refusal to provide any further documentation or invoices that will prove that the house was built after the date of divorce. The Applicant instead made unfounded allegations that he was biased. The 2nd Respondent submitted her secondary documentary proof on 6 September 2018. On 5 November 2018 he addressed correspondence to the Applicant requesting clarification on specific issues. There was no reply until January 2019 when the Applicant appointed a firm of attorneys, who also ignored his letter of 5 November 2018 and instead sought his removal.

[21] He has deduced from the Electrical Compliance Certificate of 5 November 2009 that the roof must have been completed at that time as the electrical wiring cannot be done unless the roof and ceiling are finalized. He however, was disputing

the Certificate dated 15 September 2009 on the Foundation. According to him the date indicates when the certificate was issued not when the inspection was done. The foundation report was not attached, which could have indicated the date on the progress report and photographs at specific stages. He tried to contact Mr Joubert, the appointed civil engineer without success and ultimately found that he was disbarred on 14 August 2019. His further correspondence to Applicant's attorneys was responded to with various insults and allegations.

Inflating the property value to increase costs.

[22] He argues that Applicant's accusation that he is inflating the value of the property so that his fees can increase has no merit, but a bullying tactic to pressure him to amend his property valuation to the amount of R550 000, despite the evidence that is to the contrary. He refutes the likelihood of the property having been built in a month and a half and emphasized the importance of Joubert's evidence under affidavit and the documentary evidence of invoices and payments to prove the expenses incurred after the divorce, to expedite the process.

[23] Applicant's attorneys are said to have continued to ignore the contents of his communication persisting with accusations of his bias towards 2nd Respondent. They called for him to furnish them with a final and correct factual liquidation and distribution account failing which they threatened to apply for his removal.

The effect of failure by Applicant to furnish further information or documentation

[24] 1st Respondent argues that should the Applicant have provided him with the information he had requested, the relevant amendment could have easily been effected on the liquidation and distribution account. Without further substantiation, he couldn't amend the valuation as at date of divorce to be any other amount. He indicated that he has proceeded to request from the financial institutions copies of financial statements of the parties in order to verify the information. During the period 2020 to 2021 they made verifications from the bank statements received and could not find anything that is proof of purchase after the date of divorce.

[25] He visited the Municipality and contacted Woodbrooke Estate Management for further information. The 2nd Respondent also furnished him with more information and received nothing from the Applicant. The information from the Estate Management indicates that the property was a vacant stand when registered on 21 December 2007. The Management received building plans on 13 February 2008 and payment of the administration fee for the plans on 21 February 2008 and they were approved on 27 February 2008. On 7 September 2009 the Applicant was informed that the building must be finished and a Certificate of Occupancy submitted. On 23 September 2009 the Applicant and the 2nd Respondent were issued with remotes to the estate. On 1 October 2009 the Estate Management started charging penalties for failure to obtain a certificate of occupancy. On 29 March 2010, the Applicant agreed with the Management for the penalties to be held back until July 2010.

[26] He, requested more statements from the 2nd Respondent in 2021 after Covid. In January 2021 he attended a meeting with the Council to verify the Occupational certificate by Willowbrooke. He was told that the dates are unreliable. He therefore continued with his investigation. He requested an affidavit from Willowbrooke Management in 2021. They did not cooperate even after his attorneys formally made the request.

[27] On 27 September 2021 he distributed an amended provisional report. The Applicant still wanted him to reflect the property value to be R550 000, notwithstanding that the municipality value was R1 080 000 as in November 2009. Applicant persisted that the property was an open piece of land thus not occupiable and 1st Respondent could have established that by enquiring if parties resided there at the time. According to him the question is not whether the property was occupiable but whether the structure was already completed or at a very advanced stage of construction. Even if at the least the Municipality account and all extra evidence is ignored and the Applicant's version is accepted, construction had already commenced before 15 September 2009 in terms of the Foundation inspection certificate and as such the property could not have been an open piece of land at the time of the divorce.

[28] After receiving further information from the parties he compiled his final report and submitted it on 21 February 2022. He received a response from 2nd Respondent on queries raised by the Applicant' on the Landhoven property. On 10 March 2022 he received a response from Applicant's attorneys who once again disregarded all the information submitted to them and instead threatened him. He never received the information he required from the Applicant to fulfill his duties. Applicant seems to suggest that the whole building was started and completed between 15 September and November 2009. In his opinion reading from the certificates and valuation report, he concluded that the construction on the property ought to have been either completed or at an advanced stage as at date of divorce.

[29] He confirms that the following documents were submitted by the Applicant. The final Occupancy Certificate dated 26 July 2010. A Completion Certificate by the Municipality dated 9 December 2009. A Completion certificate on the foundation inspection dated 15 September 2009. Completion certificate on Lithol and concrete slab dated 6 November 2009. Roof loading certificate dated 10 November 2009. Engineering completion certificate dated 10 September 2009. Certificate on Occupational Safety and for Electrical Installation dated 5 November 2009. Plumbing Compliance Certificate of the City of Johannesburg dated 26 July 2010. He says all this implies that the construction on the property was initiated before the date of divorce. The property was already at an advanced stage of construction at the date of divorce. As no bond was registered, he needs to know which and how much of the joint estate's funds were applied and what was the value of the improvements made as at date of divorce.

[30] He challenges the timelines presented in the certificates as unlikely and argues that the certificate of occupancy shows this impossibility when it indicates the foundation and slab inspection to have happened it seems at the same date on 15 September 2009. Whilst the Completion Certificates in respect thereof indicate an inspection date of 15 September and 6 November 2009 and finally signed off on 9 December 2009. According to him the dates are unreliable as they differ so vastly. He reckons it would be reckless and irresponsible of him to accept the dates on the certificates without a full and further investigation, which is an indication of his impartial and independent stance in the matter.

On the delay

[31] According to him, the delay on his part was caused by the attempts he made to contact Mr Joubert the civil engineer whom he found out was disbarred. His investigation documentation exceeds 1000 pages. He has only attached the relevant documents to the final report. He also did not want to respond to defamatory statements towards his character and integrity.

On the extra costs incurred

[32] He persists that it is the Applicant who was refusing to furnish him with documentation to prove his version. He therefore avers that it was due to the Applicant's refusal to co-operate that he incurred extra costs as he had to conduct lengthy investigations with the Municipality, Willowbrooke and the banks. He also had to appoint attorneys to assist him with the investigation. The costs include the valuation costs as well.

[33] He battled with the truthfulness and impossibility of the Applicant's version and the credibility of the Municipality Occupational Certificate, the timelines of which are unrealistic.

[34] He agrees with the relief sought by the 2nd Respondent. As according to him it is in the interest of justice and will bring finality to the matter. He accuses the Applicant of wanting to delay the process by applying for his removal and to get an opinion which will suit the Applicant's pocket and his needs whilst acting to the detriment of the joint estate and respective parties involved.

[35] The 1st Respondent further argues that due to the gross abuse of the court process by the Applicant and misinterpretation of the facts to suit his version, the defects in his application, his non-compliance with the rules and the fact that he did not come to court with clean hands and does not take the court into his confidence by failing to disclose the true facts, making baseless accusations, a cost order should be granted against the Applicant on attorney and client scale. The 1st

Respondent submits that the cost order forms part of the joint estate and the costs be allocated to Applicant's 50% share.

2nd Respondents answer

[36] According to the 2nd Respondent the Applicant has perjured himself in various respects, made objections on the report and brought these proceedings to delay the conclusion of the separation of the joint estate. She suffers an enormous prejudice whilst the Applicant continues to enjoy the benefits of the use of the property, the largest physical asset of the joint estate and the erstwhile matrimonial home where Applicant continues to reside whilst she has no benefit in respect thereof even though she is entitled to also share in the value thereof.

[37] On the final report, she concurs with the 1st Respondent that the 1st Respondent has not misconducted himself in relation to his duties, neither has he committed a gross irregularity, exceeded his powers nor brought out the report improperly. The report is not patently unreasonable, irregular or incorrect. As such the report must be accepted. She denies that there are any grounds for the 1st Respondent's removal.

[38] She confirms all that relates to her that is mentioned in the 1st Respondent Affidavit. She further points out the time that has passed since the divorce and the 1st Respondent's appointment 8 years following the decree of divorce, that they are still squabbling and have not finalized the division of their joint estate. She therefore argues that the order sought by the Applicant will cause a further delay whilst the process starts *de novo*. In the meantime, the Applicant continues to benefit from the joint estate, not paying rent or for accommodation whilst she has to incur accommodation costs despite being a co-owner thereof.

[39] According to her the construction on the property was started and completed before 15 September 2009, the date of divorce. They moved in, in November 2009 into a completed structure. As proof she referred to the photo posted on social media by her stepson on 11 December 2009. A mostly completed immovable property is reflected. She alleges the photo to show a completed structure which according to

her proves that the structure was complete as at date of divorce. The improvements on the property were on date of divorce at such an advanced stage that they were able to move in and occupy the said immovable property during November 2009.

[40] On 5 March 2008 they sold an immovable property situated at Weltevredenpark, registered in the name of the Applicant for a sale price of R1,015,000.00. It was transferred to the name of the buyer on 6 August 2008. The proceeds received from that sale were received and applied by the Applicant to construct and improve the Willowbrooke property.

[41] On 4 May 2009 before the date of divorce she also sold her house in Lindhaven, Johannesburg for a sale price of R500,000.00. The purchaser paid off the bond owing in an amount of R320,000.00. The Applicant collected the outstanding amount of approximately R180,000.00 from the purchaser, which was paid in cash instalments as per the agreement with the purchaser until registration of transfer on 16 October 2009. The money was applied towards the construction and improvement of Willowbrooke property.

[42] On 5 May 2008 she received a pension payout in an approximate amount of R355,000.00. She paid an amount of R300,000.00 to the Applicant on 11 September 2008 for purposes of also utilization towards the construction and improvement of the Willowbrooke property.

[43] She confirmed that according to the Willowbrooke Estate Management the property was supposed to have been fully developed by September 2009 and penalties were payable from October 2009. The Applicant negotiated an extension to obtain an Occupational Certificate by July 2010.

[44] The Applicant registered a bond on the Willowbrooke property on 28 September 2010 after the divorce, in the amount of R440 000 without her consent or knowledge. She moved out of the property during December 2010 which she indicated must be sold. The Applicant wanted to retain the property.

[45] According to her the 1st Respondent has done all that he was required to do whereafter he submitted his final report. She sees no reason why he must not be paid his fees and for somebody else to be appointed. She challenges the relief sought by the Applicant for appointment of Ms Symes whom he has unilaterally chosen and for the 1st Respondent and herself to pay costs on an attorney and client scale, as ridiculous. She instead calls for the application to be dismissed, and the Applicant to pay the costs on an attorney and client scale.

[46] She seeks in a counter application that the final report be accepted, and the Applicant be ordered to pay her an amount of R986 639.65 in the distribution of the joint estate.

Applicant's reply

[47] In his reply the Applicant maintains that the divorce was before the property was built. He alleges that the 2nd Respondent opportunistically tried to steal from him after she had obtained a decree of divorce behind his back. She had told him to ignore the summons that was served on him for a divorce as she was just "angry" and "did not mean it." At the time there was nothing but an empty stand.

[48] He does not agree that the final report should be accepted. He insists to have built the house with his own funds after the divorce and the 2nd Respondent to have wrongly thought she could share in it.

[49] He denies having delayed the whole process and blames the 2nd Respondent's alleged deceit and the fact that she had to find a liquidator who would assist her by not willing to apply the true facts in the matter. She did not anticipate the implication of the date of divorce. She was struggling to indicate what parts of the house were complete on 14 September 2009 but keeps on using the words it was "at an advanced stage." He accuses the 1st and 2nd Respondent of distorting the facts to benefit the 2nd Respondent in a way she is not entitled to on the facts of the matter.

[50] He denies that the property was ever a matrimonial home since when they moved in, they were not married and accuses 2nd Respondent of fabricating stories

in her affidavit as she goes along. He alleges not to be surprised that she supports all that the 1st Respondent is saying in his reports.

[51] He argues that he had to retain the property after the divorce and had all the right to register a bond alone as he is the one who had to finish the building works that were still outstanding. He insists that the building work started on 15 September 2009, a day after the divorce and they moved into the property late in December 2009 when the building was finished. He does not deny the photo posted by his son but argue that the building still did not have windows or doors but was an empty shell that was still in progress. It was finalised on 11 December 2009, just before Christmas.

[52] He denies the 2nd Respondent's allegations about the sale of two properties, one registered in his name and the other in 2nd Respondent's name, that the proceeds were used for building the structure in the property. He alleges all that to be a fabrication that the 2nd Respondent makes as she gets along. He also denies the 2nd Respondent allegation that money from her pension fund was paid to him and that it funded the improvements. He points out that the 2nd Respondent also fails to attach any proof.

[53] He likewise highlights the discrepancies in the averments made by the 2nd Respondent in relation to the date they moved into the property, that she has said that they moved into the property in November 2009. Later on attached the picture posted by his son and alleged that the picture was posted when they moved in, in December 2009.

[54] He denies that the property was to have been built by September 2009 and that the Homeowners wanted to penalise them since the house was not complete and that they were given an extension to obtain the Occupancy Certificate by July 2010.

On the costs

[55] According to him the fact that the 2nd Respondent supports the 1st Respondent's argument on the costs is an indication that they are in cohorts, the 1st Respondent being the referee the 2nd Respondent chose and applied for to be appointed as the Liquidator. The two are clearly working together and that is why the 2nd Respondent is also supportive of the fees that the 1st Respondent claims he should be paid. He disputes 2nd Respondent's criticism of him choosing the Liquidator alone, arguing that she also did the same when she alone sought the appointment of the 1st Respondent.

[56] He argues that his costs must be paid by both Respondents since both are responsible for dragging out the finalisation of the division of the joint estate by ignoring the true facts and attempted to force him in terms of a false report to sell the property that the 2nd Respondent contributed nothing towards as it was not yet built at the date of divorce. He accuses the 1st Respondent of abusing his powers to enforce the lies of the 2nd Respondent, since they are in the same corner.

[57] He confirms the averment by the 2nd Respondent that they moved into the property in December 2009 which supports what he has been saying all along, that the property was ready from 11 December 2009 after the doors and the windows were installed.

[58] He accuses both the 1st and 2nd Respondent of dragging out the finalisation of the division of the joint estate, in order to force him to sell the property, ignoring the true and simple facts that 2nd Respondent contributed nothing towards the building. The 1st Respondent is abusing his powers to enforce the lies of the 2nd Respondent.

[59] He denies the 2nd Respondent's allegations that she left the house in December 2010 due to the infighting and that she moved back in October 2011 and started looking for a liquidator. He confirmed that certain minor further developments would have been attended to at that time.

[60] In response to 2nd Respondent statement that he had attached letters without indicating what is relevant therein and they should not be admitted, he accused her of playing games. He then lambasted the 1st Respondent for supporting the 2nd

Respondent. He found the refusal by the 2nd Respondent to admit the content of the letters from his attorneys and both Respondents' denial that there was no empty stand as at date of divorce as shown in the photograph posted by the Applicant's son to be senseless. He alleges the 1st Respondent's findings on the pension fund money to have been 'used to buy the stand to be untrue but made out to support the 2nd Respondent.

[61] He alleges to be mortified and amazed by the 2nd Respondent's comments that she would deny the purported overwhelming evidence of a fruitless and pointless exercise by the 1st Respondent or that he had preconceived ideas.

[62] He points out that any person who holds an office of Liquidator and is appointed to such office by the Court *should be objective, truthful in their application of the facts and in their application of their mind to the facts*. The interest of justice requires a person to apply his mind to the true facts of the matter, which is not the case in this matter. He says the 1st Respondent's biased approach is too obvious to ignore.

[63] The Applicant also seeks a dismissal of the 2nd Respondent's counter-application on the basis that she is in no position to seek an order either for finalisation or confirmation of the report and compliance therewith, as this was something she did not initiate or the payment of an amount of R986 839 65 to her. Only the Liquidator would have such authority.

Issues to be determined

[64] Whether there is any justification, which is a good cause for the removal of the 1st Respondent as liquidator of the joint estate, looking at the reasons proffered by the Applicant, relating to the 1st Respondent's conduct in the fulfilment of his mandate, that he was biased, failed to consider relevant information with objectivity and honesty whilst deliberately delaying the matter and inflating costs. Or if there are disputes of facts that requires the matter to be referred for oral evidence, even though raised late in the heads of argument by the Applicant, If not, whether the 2nd

Respondent has authority to apply for the confirmation of the Final report, if so if same should be confirmed.

[65] In an action the burden of proof would have been on the Applicant to show on a balance of probability a good cause for the removal of the liquidator. Since these are motion proceedings, where there are disputes of fact the Plascon Evans Rule is applicable, that is the general rule of resolving disputes of facts inherent in the matter,³ in that a final order may only be granted if the facts stated by the Respondent, together with the admitted facts in the Applicant's affidavit, justify such an order. Further that "*where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.*"⁴

[66] It is however also trite that, in certain instances the bare denial by Respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.⁵ In such a case the allegations made by the Applicant may be taken into account in deciding whether the order sought is justified, unless the Respondent has requested that the Applicant's deponent be subjected to cross-examination.⁶ The court in *National Director of Public Prosecutions v Zuma* commented as follows on the Plascon Evans Rule:

"It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers."

Legal framework and Analysis:

[67] For a fair, authentic, and transparent liquidation process, the efficiency, integrity, impartiality and effectiveness of a liquidator is crucial, as is the same in any other judicial initiated process. A liquidator is therefore to avoid any conduct that

³ *Plascon-Evans Paint Limited vs Van Riebeeck Paints Pty Ltd* 1984 (3) SA 623 A at 634E- 635D

⁴ Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at p 235 G,

⁵ see in this regard *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, [1949 \(3\) SA 1155](#) (T) at pp 1163-5; *Da Mata v Otto, NO*, [1972 \(3\) SA 585](#) (A) at p 882 D - H

⁶ *National Director of Public Prosecutions v Zuma* [\[2009\] ZASCA 1](#); [2009 \(2\) SA 277](#) (SCA) para 26

might compromise the integrity of the process and its outcome, remain impartial or maintain impartiality during the process; effectively perform his or her duties with honesty and without any or minimum delays to avoid complains or applications for their removal. Impartiality connotes being free from any influence or bias, whilst honesty implies being transparent and acting with integrity and fairness. These being the overarching principles for an equitable and just division of the joint estate. Failure in any of the mentioned qualities may lead to a removal.

[68] The Courts however have a wide discretion as to the circumstances in which they may remove a liquidator. The courts often apply in the appointment and removals of liquidators for the division of joint estates in divorces, the principles applicable to the appointment and removal of receivers and liquidators for the division of assets of commercial partnerships. The all-encompassing requirement being that there should be sufficient grounds or good cause for the removal of a liquidator or receiver. What will amount to a good cause will, however, depend upon the circumstances of each individual case. It can be inter alia, lack of any of the stated requirements, impartiality, transparency, honesty or effectiveness and or delay, together or individually.

[69] The removal is therefore not confined to instances of maladministration, misconduct or personal unfitness as is enunciated in *Ma-Afrika Groepbelange (Pty) Ltd v Millman and Powell NNO*⁷ where the following is stated:

‘Good cause for the removal of a liquidator has also been held to have been shown where a liquidator has not been independent. This was a ratio of the judgment in Re Sir John Moore Gold Mining Co (1879) 12 ChD 325 (CA) at 332, where a liquidator was removed because his “interests may conflict with his duty”. See also Re P Turner (Wilsden) Ltd (1986) 2 BCC 99, 567 (CA) at 99, 570 and Re London Flats Ltd [1969] 2 All ER 744 (Ch) at 752E-F, where it was held that a liquidator should be “wholly independent” and that the removal of a liquidator should be “in the interests of everyone concerned in the liquidation”.

⁷ 1997 (1) SA 547 (C) at 561H-J

[70] Furthermore in *Prinsloo v Master of the High Court & Others*,⁸ the court referred to the summation in *Standard Bank v Master of the High Court & Others*⁹ by Navsa JA of the relevant principles applicable to the removal of liquidators as follows:

[125] in *Hudson and others NNO v Wilkins NO and others* 2003 (6) SA 234 (T) (at para 13) the following appears:

“[13] A liquidator may be removed from office if there is sufficient suspicion of partiality or conflict of interest, since a liquidator must be and appear to be independent and impartial. He or she must be seen to be independent since his duties as liquidator may require him or her to investigate. (See *Re Giant Resources Ltd* [1991] 1 Qd R 107 at 117; *Re National Safety Council of Australia (Vic Division)* [1990] VR 29 ([1989] 15 ACLR 355 (SC Vic); *City of Suburban Ltd v Smith* [1998] 28 ACSR 328 (FC of A) at 336.) A Court will exercise its discretion to remove a liquidator if it appears that he or she, through some relationship, direct or indirect, with the company or its management or any particular person concerned in its affairs, is in a position of actual or apparent conflict of interest. In exercising that discretion Bowen LJ in *Re Adam: Eyton Ltd: Ex parte Charlesworth* (1887) 36 Ch D 299 at 306 said:

“Of course fair play to the liquidator himself is not to be left out of sight, but the measure of course is the substantial and real interest of liquidation.”

,...

Further on, the following appears:

‘Although there may be no individual characteristic in itself sufficient on which to base a conclusion that a liquidator is unfit, there may be a number of circumstances which combined might force the court to that conclusion. Also the court might take into account some unfitness on the part of the liquidator together with what might be in the interests of those persons interested in the liquidation. A relevant factor is also the costs that would be incurred if another liquidator has to come and complete the work that the present liquidator has

⁸ (28039/17) [2021] ZAGPJHC 38 (3 November 2021) at para 11

⁹ 2010 (4) SA 404 (SCA)

already done. Thus in the circumstances the court will be less likely to discharge a liquidator towards the end of the winding-up, after he has become acquainted with the affairs of the company, than it would early in the winding-up although each one of these considerations taken singly might not be sufficient to justify the removal of the liquidator, taken together they might be.'

[71] It is therefore apparent that independence, that is impartiality, being free from any influence, would mainly be key in the liquidator's role. However, simple complaints or allegations of a perception of bias, partiality, lack of independence or unfairness without more, will therefore not suffice, nor will it ordinarily be sufficient to show simply that the liquidator made questionable decisions or committed errors of judgement. Whilst these deficiencies may point to a lack of competence or experience, they will not necessarily constitute good or sufficient cause to justify the removal of a liquidator.¹⁰

Applicants' complaints

Liquidator's bias

[72] The Applicant's main contention in this matter is the manner the 1st Respondent had handled the disagreement between the Applicant and the 2nd Respondent on the determination of the value of the Willowbrooke property as at date of divorce and the 2nd Respondent's pension fund payment. The Applicant accuses the 1st Respondent of being biased, raising also the fact that the 1st Respondent was not appointed jointly by the parties, but solely chosen by the 2nd Respondent through her attorneys allegedly with instructions to act favourably to the 2nd Respondent. As a result, the 1st Respondent has felt obliged to act leniently and in favour of the 2nd Respondent.

[73] In a case where parties to a divorce cannot agree on a division of the assets, the only solution is for a receiver or liquidator to be appointed. Ideally, a mutually

¹⁰ *Ma-Afrika* n 12 at 566B-C

agreed liquidator would be preferable to avoid any potential discontent. Hence the discussion and agreement between the parties on the appointment of a liquidator is foremost encouraged. However, failing consensus, a spouse or ex-spouse bringing an application for the appointment of a receiver or liquidator, exercises his or her right to apply for this. There must be a good reason shown by the court as to why the appointment of a liquidator should not be allowed.¹¹ The resultant appointment per se cannot give rise to an assumption of the liquidator's bias or likelihood of bias towards the party on whose behest the liquidator is appointed.

[74] The parties *in casu* have been divorced for nearly eight years without the issue of the division of their estate being finalized. Short of an agreement, any of the parties was therefore entitled to apply for the appointment of liquidator or receiver for finalization of the remaining disputes relating to the joint estate. The Applicant's allegation, following such an appointment, that the 1st Respondent is an agent of the 2nd Respondent, therefore doing everything in his power to see to it that the 2nd Respondent obtains a benefit to which she is not entitled, is ill advised.

[75] In *S.S.M v P.J N.O and Another*¹² the court clarified that situation as follows:

"The inherent power of the court to appoint such an officer to assist in the division goes as far back as in the matter of Gillingham v. Gillingham, 1904 T.S. 609 where INNES C.J., stated: 'But where they do not agree the duty devolves upon the Court to divide the estate, and the Court has power to appoint 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- perhaps curator is the better word) to collect, realise, and divide the estate."

[76] A receiver or liquidator is therefore an officer of the court, vested with authority to deal with the assets of the joint estate under the direction of the court. The effect of the appointment of a liquidator or receiver is to place the assets

¹¹ *Maharaj v Maharaj and Others* 2002(2) SA 648 (D & CLD) at 652 C

¹² (15515/2017) [2023] ZAGPPHC 2024 (18 December 2023)

of the joint estate under his or her authority, to divide the estate in accordance with the law, for and on behalf of the court. He/she is required to account for the liquidation and distribution by rendering a liquidation and distribution account, subject to objection by parties affected thereby. In *Coetzer v Coetzer*¹³ the following was said about the office of receiver:

“Applikante het geen *locus standi* om die aansoek op eie houtjie te doen nie. Die ontvanger is ‘n geregsamptenaar: hy verteenwoordig die hof. Assulks is hy ‘n belanghebbende party in die aansoek en applikante se aansoek gaan mank weens versuim om hom saam te voeg

Vlg:

Gillingham v. Gillingham, 1904 T.S. 609 at 612.)

[77] The power conferred upon a liquidator includes a general power of attorney, where justifiable, to market, sell and realize any immovable property, to approach any financial institution to access statements of accounts, obtain balances on statements of savings account, investments and pension funds. This will include providing the financial institutions with specific instructions to withdraw any amount from such accounts.

[78] The 1st Respondent is consequently not acting as an agent of the 2nd Respondent but of the court, carrying a responsibility to the court to divide the joint estate. The Applicant’s assumption of the 1st Respondent’s biased towards him, based on the fact that the appointment was at the behest of the 2nd Respondent is misguided.

[79] The Applicant further alleges that the 1st Respondent was instructed to help the 2nd Respondent, which made him feel obliged to do so. As a result, the 1st Respondent went or wanted to go about exercising his mandate in fulfilment of his duties that indicate lenience to the 2nd Respondent, exhibiting favouritism. Applicant alleged that to be proof of 1st Respondent’s lack of impartiality, and unfairness.

¹³ 1955 (1) PH B1 (O)

[80] Except for the Liquidator's general powers and duties granted to the 1st Respondent in terms of Order annexed marked "F", he was also specifically ordered to investigate, *inter alia*, the registration of a mortgage bond by the Applicant in favour of Standard Bank of South Africa against the title deed of the immovable property in the joint estate of the parties, to determine what transpired in respect thereof, and in the event of the 1st Respondent finding that the joint estate of the parties suffered a loss as a result of the Applicant's conduct in respect thereof, to make an adjustment in favour of the Applicant in respect thereof.¹⁴

[81] It is understandable that the whole purpose of the whole order was to facilitate the finalization of the division of the joint estate, to make sure that it is done equitably, and that the 2nd Respondent is not prejudiced by any conduct that might have resulted in the joint estate suffering a loss at the hands of the Applicant, the party in possession and control of the asset in the joint estate. What the receiver and liquidator, in such circumstances do, is still to attend to the modus of giving effect to the court order for purpose of division of the joint estate. The duty he fulfills is to receive the assets and liabilities of the joint estate, liquidate same and distribute the free residue to the parties. In case of a loss suffered by the estate at the behest of Applicant or any of the parties he is, in terms of the general powers, ordered to make an adjustment accordingly.

[82] The receiver and liquidator can, when he attends to the modus of dividing the joint estate, then make an adjustment. He, however, cannot decide whether such an adjustment must be made or not, the court does,¹⁵ hence the order cum instruction. The special order was specifically made in favour of 2nd Respondent as the party who would have likely suffered prejudice in relation to the immovable property in the joint estate. The Applicant has been in possession and control of the property, seemingly taking decisions in relation thereto during and after dissolution of the marriage. The 1st Respondent is therefore obliged to investigate if any adjustment is necessary to circumvent 2nd Respondent suffering a deficit.

¹⁴ This is in line with Section 15(9) of the Matrimonial Property Act 88 of 1989 (the MPA').

¹⁵ *M v M* (82156/14) [2017] ZAGPJHC 354 (20 November 2017)

[83] The liquidator's investigation conducted from that perspective would seem to favour or be lenient towards 2nd Respondent, but is certainly neither indicative of 1st Respondent's personal intent to do so, nor justify the criticism resultant therefrom. Any such criticism is ill advised, unless the Applicant can prove that 1st Respondent's conduct was beyond what was reasonably intended by the order.

Overlooking Applicant's complaints

[84] On the other hand the Applicant's complaint is that the 1st Respondent overlooked his complaint about the deficit information submitted by the 2nd Respondent and was reluctant to pursue or investigate the complaint as energetical as he did in Applicant's circumstances. The Applicant mentioned the issue of the 2nd Respondent's Pension and her Landhoven property, the parties' former abode, the sale of which was unnoticed by the 1st Respondent and not mentioned by the 2nd Respondent. The sale and the Pension were then investigated following Applicant's complaint. The allegation that part of the Landhoven sale proceeds in the amount of R180 000 were collected by the Applicant from the purchaser in monthly instalments and used on improvements on the property is disputed by the Applicant. No proof was attached.

[85] On affidavit in a different forum, the 2nd Respondent had stated that the property was sold for R650 000. The additional amount of R150 000 was not accounted for. The Municipality Account for Landhoven that 2nd Respondent reported to be still in arrears post registration of transfer in October 2009, which was an unlikely situation, was not found. The 1st Respondent reported to have found that 2nd Respondent received her pension pay out in 2008 already. She alleged to have paid an amount of R300 000 into the Applicant's account. The Applicant denied receiving the money. The follow-up enquiry on the 2nd Respondent was indeed done with the insistence of the Applicant. However 1st Respondent lack of vigour is not reflective of any bad faith but a disjointed prioritization and focus.

1st Respondent's alleged disregard of true facts about the property

[86] The Applicant was stern on his accusation that the 1st Respondent was ignoring the true facts about the property and refusing to consider the information and all the documentary evidence he submitted to indicate the exact state of the development at the time of divorce and prove that the valuation the 1st Respondent put on the property could not have been what the value of the property was at date of divorce. He accused the 1st Respondent of having always had a preconceived idea of assigning a specific value to the property in an attempt to assist and benefit the 2nd Respondent, despite the information tendered. As a result, the 1st Respondent's final report ignores all the correspondence and proof in every legal measure, deviates from all logical reasoning, as the 1st Respondent has got only one purpose in this matter, that is to benefit the 2nd Respondent. being interested in only what is stated by her. The 1st Respondent has gone further and threatened to sell the property even though he is living in it.

[87] This is not correct. This is only a lopsided analysis of the situation around the report, ignoring the fact that the 1st Respondent has not been able to get the co-operation required from the Applicant. The Applicant has refused a request to submit the information or documents requested regarded by the 1st Respondent as crucial for resolving the existing stalemate on the value of the property and reaching finality. The 1st Respondent indicated that he otherwise in the Final report had to rely on Root X's property valuation of the completed structure. He noted that in his view, *failing Applicant's cooperation*, that is the value of the property to be considered for the purpose of determining the distribution between the parties.

[88] The 1st Respondent refutes the allegations that Applicant's input was disregarded and that the property was a vacant land at date of divorce. He rightly had considered the documents submitted by the Applicant prior to obtaining the valuation. After consideration thereof, he concluded that the certificates imply that the construction on the property was at date of divorce already initiated and at an advanced stage. As no bond was registered, he needed to know which and how much of the joint estate's funds were applied by the date of divorce and what the value of the improvements were as at that date, which is a reasonable consideration. He requested the Applicant to submit documents and invoices of expenses on the said improvements so as to enable him to make the necessary assessment but

nothing was forthcoming. It is therefore not correct that factual submissions were disregarded.

[89] The consideration of the R2 200 000.00 as the valuation of the property at date of divorce, however goes against the 1st Respondent's own assessment he made on receiving the Root X evaluation, that "the improvements resulted in the property being evaluated at R2 200 000.00 which implies that if on the date of divorce there was no structure as alleged by the Applicant, an extensive capital was applied in the improvement of the structure after date of divorce, however, no proof of such has been received. He hence correctly asked the Applicant to submit documentary proof of the funds applied and invoices of the expenses incurred on the improvements then to substantiate the Applicant's allegations that there was no structure. In my view there is no other sensible way of ascertaining if any construction was already there on the date of divorce than by assessing the documents sought from the Applicant. More so as it is certain that the structure was not complete on the date of divorce. As a result, the outstanding documents and invoices are central to resolving the impasse.

[90] The conclusion on the state of the structure or construction on the date of divorce should be made from factual evidence. Moreover the Applicant and the 2nd Respondent have alluded to improvements made post the date of divorce. The 2nd Respondent pointed out that the purpose thereof was to get the Certificate of Occupancy. I do not find the 1st Respondent's conduct to have been deliberate or intended to please the 2nd Respondent or to have disregarded Applicant's documents nor to have been made in bad faith, considering the resistance by the Applicant. However the incongruity of considering the 2018 evaluation of R2 200 000 to have been the value of the property at date of divorce following the conclusion he made cannot be overlooked.

[91] The 1st Respondent's problem with the timelines presented in the certificates as being unlikely and impossible, especially where it seems the whole house was built from foundation to roof in 3 months is sensible. Especially, when according to the Municipality Certificate of Occupancy the foundation and slab inspections are supposed to have been inspected at the same date on 15 September 2009. Whilst

the Completion Certificates in respect of foundation and slab indicate an inspection date of 15 September and 6 November 2009 and finally signed off on 9 December 2009. Certainly there was some construction already before the date of divorce. The dates are unreliable as they differ so vastly, as pointed out by the 1st Respondent. The 1st Respondent reckons it would have been reckless and irresponsible of him to accept the dates on the certificates without further investigation, which he argued was an indication of his impartiality and independence in the matter. His explanation for not accepting the certificates on face value is reasonable. A situation and stance which I agree can be reassessed on receipt of the information requested. So far, the implication of a foundation inspected a day after the divorce is that on the date of the divorce there was a foundation already. It unquestionably creates doubt that nothing was built on the property yet.

[92] The 2nd Respondent said he accordingly battled with the truthfulness and impossibility of the Applicant's version plus the credibility of the Municipality Occupational Certificate, the timelines of which are unrealistic. He therefore indicated to the Applicant a sensible way in which the impasse can be resolved. I am of the view that it is the 1st Respondent's prerogative to doubt any information as long as the reasons for such doubt are coherent and a sensible way to resolve the impasse instigated. The solution, a request for the invoices and documentation showing expenses incurred during the construction was, as indicated by the 1st Respondent, made after consideration of the information already tendered by the Applicant. Applicant's allegation that the purpose of the request was to lean on finding that the property was as per Root X valuation, so as to benefit the 2nd Respondent is unfounded. The information requested will instead give insight into what was and what was not there on the date of divorce and which of the improvements were effected thereafter.

[93] 1st Respondent is in terms of the powers bestowed upon him authorized to take further steps that will enable him to make a proper assessment of the joint estate and bring the process to finality. The status quo with the Applicant refusing to comply with the instruction is unacceptable. He has extensive powers as per the order of the court which he can use to compel 1st Respondent's compliance, so that

he can fulfill his obligations properly. In Gallam¹⁶, the court explained such power as follows:

“Where such liquidators had been appointed, and there was a dispute as to their powers, the Court ordered them to carry out their duties (a) by taking possession of the assets, collecting the debts due to the estate, and determining and discharging the liabilities; (b) by demanding from the former spouses an account of all assets taken possession of or dealt with by them since the decree of divorce, and delivery of any assets still in their hands; (c) by dividing the assets so collected or by selling the same and dividing the proceeds.

The Court also gave the liquidators leave to apply for directions in case of any special difficulty; interdicted both spouses from in any way dealing with the assets without permission of the liquidators; and directed the latter to pay each of the spouses such sum for maintenance as under the circumstances they should deem fit, and to report to the Court when the estate had been finally divided.”(my emphasis)

[94] The implementation of the Root X valuation for the value of the property on date of divorce is misplaced when considering the averments made by all the parties, hinting at the construction to have still been probably at an advanced stage in December 2009. The 1st Respondent referred to the picture that was posted on social media by the Applicant’s son, to express his view that, on 11 December 2009 the building was at an advanced stage but not yet complete. The Applicant pointed out that the windows and doors, inter alia, were not yet installed. Considering also the Municipality valuation of the property of R1 080 000.00 in November 2009, it is probable that the construction on 11 December 2009 was at an advanced stage, but of not yet complete. In that instance the construction cannot be perceived to have been complete on date of divorce to justify a postulation of the Root X valuation.

[95] It recently became settled law that the date upon which the value of the joint estate is to be determined is indeed the date of the divorce.¹⁷ The estate can only suffer loss prior to or on the date on which the value of the joint estate is to be

¹⁶ Supra

¹⁷ *Brookstein v Brookstein* [2016 \(5\) SA 210](#) (SCA) at para 15 to 21

determined, unless proven that the transaction had the effect of diminishing the value of the estate as at date of divorce. Hence the issue of the bond that was registered after the divorce cannot form part of the joint estate. The difficulty of establishing the value of the property at date of divorce is real and daunting without the co-operation of the parties.

[96] The 1st Respondent is clothed with a wide range of power including approaching the court for any further direction as he may consider necessary, or to institute any legal proceedings against any person for the delivery to him of any assets, deeds or documents relating to the joint estate in whatever court it shall be appropriate to do so. The court can therefore be turned to, where there is an obvious indication of concealment of evidence or refusal to tender necessary information.

[97] Nevertheless even though there has been an error of judgment on further steps to be taken in such a situation, that is reliance on the Root X evaluation, the Applicant has failed to prove 1st Respondent deliberate and or mala fide intention and disregard of the information he tendered. The Applicant was actually instrumental in delaying the resolution of the impasse, determined not to co-operate. In so doing so, he frustrated and prevented a proper assessment of the value of the property on the date of divorce.

Inflating costs by unwarranted conduct

[98] The 1st Respondent's explanation of the difficulty he experienced in getting the co-operation of the Applicant is not disputed. Certain aspects of his investigation on the state of the property at date of divorce could have been easily clarified, the situation being friendlier and easier with Applicant's full co-operation. The improvements on the property and the dates they were effected established from the submitted invoices or documentation. Bar that information, the 1st Respondent's subsequent endeavor to collate further information from the banks, Estate Management and the Municipality, occasioned by the Applicant's refusal to co=operate, is defensible.

[99] The 1st Respondent explained that he could not rely on the certificates furnished as there were some discrepancies in the information at the Municipality and that of the Engineer, the Inspectors and the Estate Management. All this warranted clarification from the Applicant failing which a further investigation. The Occupation Certificate did not offer any guaranteed information either. The 1^s Respondent therefore had to ascertain the true state of the building as at date of divorce, hence the call for further evidence, and when non was forthcoming, it became necessary to further investigate. There is nothing that justifies the Applicant's suggestion that the purpose of the investigation was to inflate the costs or for sanctioning the costs as proposed by the Applicant given the Applicant's own conduct. It renders it justifiable that the joint estate carry the costs. The Applicant's argument that the 1st Respondent forfeits the expenses incurred has no merit.

[100] Furthermore, the allegations that 1st Respondent tried to evade his duties and refuses to concede his mistakes are unsubstantiated. The Applicant's argument and conduct refusing to co-operate and assuming that every decision or step taken was with an intention to favour the 2nd Respondent, frustrated the process and impacted on the costs. The 1st Respondent cannot be blamed to have inflated the costs.

On the delay and costs

[101] Applicant's complaint is that 1st Respondent had been dragging his feet since September 2019. He did nothing to finalise this matter, including refusing to make up his mind when he was confronted with the truth. He took long with his amended provisional report on 27 September 2021 with nothing much in it. Furthermore that, not only did 1st Respondent respond late to correspondence from the Applicant's attorneys, he took time with his reports insisting on information or documentation that had nothing to do with the joint estate as at date of divorce, persisted with his behaviour even after a further letter sent to him on 15 April 2019.

[102] There was indeed a bit of a delay with the 2nd provisional report even with the further investigation conducted. It is however not correct that the information sought by the 1st Respondent has nothing to do with the joint property at date of divorce. The determination of what was there prior the date of divorce is vital for the purpose

of ascertaining if an adjustment necessary. It is also not correct that 1st Respondent, knowing his limitations should have started right away with the investigation. His call, first for the parties to submit any documentation or invoices related to what was constructed and when as part of the investigation was practical. He was then justified to endeavour to obtain the required information in the manner he did, after Applicant's continuous resistance. It is unfortunate that the investigation did not yield the envisaged positive results.

[103] The numerous chances given to the Applicant to submit the necessary documents to prove his version was part of the delay. The 1st Respondent attempts thereafter to investigate the situation and to try and find the Engineer causing a further delay. The investigation documents apparently exceed 1000 pages even though only the relevant documents are attached to the final report. A fact not refuted. The lengthy investigations were conducted with the Municipality, Willowbrooke, Estate Management and the banks. It necessitated extra time and costs to be spent on the matter. In my view, the further investigation, the appointment of attorneys and the valuator was necessary and in accordance with his powers. Had the Applicant provided the information requested, the relevant amendment could have been made on the liquidation and distribution account, without any further delay and some of the costs incurred avoided.

[104] The Applicant has furthermore argued that the 1st Respondent should not be entitled to claim any fees in respect of this matter since he has been acting in a preconceived manner, he did not have to take charge of any fixed property or any bank accounts and did not open any kind of bank account anywhere in respect of the estate, as such he has had no real expenses. He instead decided on the face of overwhelming evidence to embark on a fruitless and pointless exercise to try and prove his preconceived ideas about the state of completion of the property at Willowbrook as at date of divorce.

[105] Applicant's allegations of 1st Respondent acting in a preconceived manner are not backed by any rational argument. According to the 1st Respondent he could not accept the word of the Estate Manager, Municipality officials and the Engineer if not supported by an affidavit to remove any doubt, especially concerning inconsistencies

he had pointed out. Since the affidavits were also not forthcoming, the verification was unattainable and further steps necessitated. On the other hand, had the Applicant responded positively to the 1st Respondent's request and tendered the information sought in time, the matter could have been resolved without any delays. The continued rebuffing of the requests, plus the unreasonable persistence with threats to remove the 1st Respondent unless he acquiesces to the amendment of the Final report without the required evidence, put the Respondent in an unwarranted position, his authority undermined. The Applicant fails to proffer any cogent reason for 1st Respondent to forfeit the expenses he incurred.

[106] Additional costs can still be curtailed if the Applicant furnishes the 1st Respondent with the required information since it will not be necessary for any further legal steps to be taken to compel him to do so, which the 1st Respondent is empowered to can do. A proper determination of the value of what constituted the joint property at date of divorce has still to take place. It cannot be served by the alternate assumption of the valuation of the complete structure when it is obvious that it was not the case at date of divorce.

Counter-Application by the 2nd Respondent

Confirmation of Final Report

[107] The decision on this issue only follows at this stage since it was dependent on the outcome in the application for removal of the 1st Respondent. The Applicant's opposition of the Application on the basis that the 2nd Respondent cannot seek an order for confirmation of the Liquidator's Final Report, is misguided. Confirmation of a Final Report can be by the Liquidator or any affected party. In *S.S.M v P.J N.O and Another*¹⁸ the following was stated:

“after consideration of all submissions, in the liquidator's account (also called a report or liquidation and distribution account) – which in itself has no legal

¹⁸ (15515/2017) [2023] ZAGPPHC 2024 (18 December 2023 At [18])

force. If all parties accept same that is normally the end of it. If not, the liquidator (or any affected party) should approach the court to ensure finality. The court, having the privilege of further oral and other evidence, should then either confirm, amend or clarify the account and grant, where necessary further and alternative relief to enable the liquidator to bring the joint estate to practical conclusion.”

[108] The Applicant’s argument is therefore not correct that since the Final Report (or the Liquidation and Distribution account) is something the 2nd Respondent did not initiate, she is in no position to seek an order either for its finalization or confirmation. and compliance therewith. Further that only the Liquidator would have such authority. Absent an agreement between the Applicant and the 2nd Respondent, the court can be approached by either of the two as the affected parties or the 1st Respondent as Liquidator, in an endeavor to bring the matter to finality. The court’s wide discretion in that instance is clearly outlined in *S.S.M supra*.

[109] However, in casu, the confirmation of the report is not yet supported by the evidence. It still has to be attended to, given the Liquidator’s requests of further information which is still to be responded to. The exact state of affairs, regarding the construction at the property on the date of divorce, is still to be established to enable the resolution of its valuation. The issue cannot be regarded as finalized with the required evidence still outstanding. No further delays can be afforded. It is up to the Applicant to disclose that information which is in his control and curtail any further delays and expenses given the history of this matter.

[110] The Applicant has in its heads of argument argued for the matter to be sent for oral evidence. As the party who is holding over the crucial evidence required, he has failed to make a case why the matter should be further delayed by reference to trial when such evidence can be expeditiously submitted by him and also by deposing to a further affidavit.

[111] The 1st Respondent is obliged to exercise the power vested on him to take the necessary steps to compel the Applicant to submit the evidence in his

possession that will enable a realistic and proper verification of what may have been the value of the property on date of divorce.

[112] There has been a major delay in the administration of the joint estate in this matter by the 1st Respondent. The whole process embroiled in disagreements due to the Applicant having had no faith in the 1st Respondent, right from the beginning refusing to cooperate. The court, has looked at all the aspects raised in this matter and decided on the appropriate steps to be taken henceforth, to bring the matter closer to finality including the justness of the removal or retention of the Liquidator at this stage.

[113] Furthermore on the removal of a liquidator, noted enunciation in S.S.M, that:

“Although there may be no individual characteristic in itself sufficient on which to base a conclusion that a liquidator is unfit, there may be a number of circumstances which combined might force the court to that conclusion. Also, the court might take into account some unfitness on the part of the liquidator together with what might be in the interests of those persons interested in the liquidation. A relevant factor is also the costs that would be incurred if another liquidator has to come in and complete the work that the present liquidator has already done. Thus, in the circumstances, the court will be less likely to discharge a liquidator towards the end of the winding-up, after he has become acquainted with the affairs of the company, than it would early in the winding-up. Although each one of these considerations taken singly might not be sufficient to justify the removal of the liquidator, taken together they might be.”

Conclusion

[114] The Applicant has failed to make a case for the removal of the 1st Respondent by proving a reasonable apprehension of bias towards 2nd Respondent, alleging instead an apprehension influenced by the manner in which the 1st Respondent came to be appointed to administer the division of the joint estate. According to him this has resulted in a conduct that indicated 1st Respondent's intention to satisfy or conform to 2nd Respondent's needs. 1st Respondent may nevertheless happen or seemed to have had no disagreements with 2nd Respondent,

or to be more lenient by affording her a longer period to respond to queries, readily accepting her answers and leaning towards her explanations, however there was no prejudicial or dereliction of duty with an intention of favoring the 2nd Respondent that was proven.

[115] The Applicant has in addition failed to prove that it was unreasonable for the 1st Respondent to refuse to accept as sufficient what the Applicant has submitted as proof that there was no construction on the property at date of divorce. Moreover, that the request for further information was influenced by any bias and inclined to benefit the 2nd Respondent except for what has been envisaged in terms of the order.

[116] Further, there being no cogent reasons at this stage for removal of the 1st Respondent as canvassed by the Applicant, even though a measure of mistrust between the Applicant and the 1st Respondent seems to now exist, the removal will serve no purpose except to further delay the matter and add on the costs.

[117] The call by the Applicant in the alternative that the matter be referred to trial is irrational and would result in a further waste of time. Especially when what is required to bring the matter to finality is obvious to both parties. The call is reliant on a fictional dispute of fact that he created by continuing to withhold the information requested by the 1st Respondent and refusing to co-operate. The matter can be resolved rather speedily by his compliance, on failure the 1st Respondent can exercise the power already bestowed on him to compel compliance.

[118] On the costs, in bringing this application the Applicant was acting in his personal capacity not in the interest of the joint estate. It is therefore appropriate that his 50% portion of the joint estate should bear the costs occasioned by this application.

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

1. The Applicant's application for removal of the 1st Respondent as liquidator of the joint estate is dismissed.

2. The 2nd Respondent's application for confirmation of the Final report is postponed sine die
3. The Applicant is to pay the costs of the Respondents which costs would form part of the joint estate and upon division is to be charged to Applicant's 50% by an adjustment effected accordingly, in favour of the 2nd Respondent

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