REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: **A 106/2023**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE 26 January 2026

SIGNATURE

In the appeal between:

ANA PAULA REAL MARQUES Appellant

and

ANEEL DARMALINGAM N.O. First Respondent

FRANKLIN BERNADINO DE SOZA MARQUES Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J (BAM J et KUMALO J concurring)

Introduction

[1] This appeal concerns the division of the joint state of the appellant and the second respondent by the first respondent, the liquidator. Leave to appeal was granted by the Supreme Court of Appeal on 24 February 2023..

[2] The liquidator's Final Amended Account ("the account") filed on 15 October 2020 and followed by a Correction Notice dated 28 October 2020 was not acceptable to the appellant and the liquidator brought an application in the court *a quo* claiming an order declaring that he is entitled to divide the joint estate in accordance with the account *alternatively* that the court issue directions in order to amend the account.

[3] The appellant opposed the application and bought a counter-application for the review and setting aside of the account and for the account to be amended in certain respects.

Background

[4] The appellant and the second respondent will be referred to as "the parties" or as cited. The parties are presently involved in litigation to terminate the marriage relationship between them. The parties were married in community of property and in terms of a court order dated 18 October 2016, the joint estate was divided equally between them. In order to facilitate the division of the joint estate the liquidator was nominated by the South African Institute of Chartered Accountants as liquidator and was appointed as such by agreement between the parties.

[5] The liquidator duly fulfilled his duties and filed the account that forms the subject matter of this appeal.

[6] The court *a quo* upheld some of the objections raised by the appellant and dismissed the remainder of the objections. The appellant's appeal lies against the objections that were dismissed by the court *a quo.*

[7] Prior to considering the grounds of appeal, it is apposite to consider the legal principles pertaining to the interference of a court of appeal with the discretion exercised by the court *a quo.*

Legal principle: interference with the discretion of the court a quo

[8] The point of departure is to determine whether the court *a quo* exercised a true or wide discretion.

[9] A court exercises a true discretion if there is a multitude of permissible options in law to choose from. Examples of the exercise of a true discretion are the awarding of costs order or damages in delict. The test for interference with a true discretion was discussed in *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 CC at para 113 (Florence) as follows:

"Where a court is granted wide decision-making powers with a number of options or variables, an appellate court may not interfere unless it is clear that the choice the court has preferred is at odds with the law. If the impugned decision lies within a range of permissible decisions, an appeal court may not interfere only because it favours a different option within the range."

[10] On the contrary, if a court has the power to determine whether facts demonstrate a legal requirement or conclusion, it is not exercising a true discretion. This proposition was explained in *Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 800F, namely:

"I do not think the power to determine that certain facts constitute unfair labour practice is discretionary in that sense. Such a determination is a judgment made by a Court in the light of all the relevant considerations. It does not involve a choice between permissible alternatives. In respect of such a judgment a Court of appeal may, in principle, well come to a different conclusion from that reached by the Court a quo on the merits of the matter.

[11] In *casu* the liquidator presented facts to the court *a quo* to justify the conclusion he arrived at. The court *a quo* considered the facts and the conclusion reached by the court *a quo* on the facts was not an exercise of the court's discretion as envisaged in *Florence.*

Grounds of appeal

Ground 1: Valuation of the St Michael's property

[12] In terms of the division of the joint estate, the second respondent retains the St. Michael's property ("the property"), and the appellant will receive half of the value of the property. The liquidator used a forced sale value to determine the value of the property.

[13] The appellant objected to the valuation of the property at a forced sale value and stated that the market value of the property is a more accurate reflection of the true value of the property. The liquidator explained that he utilised a force sale value instead of a market value in respect of all the immovable and movable assets in order to ensure an equal distribution of the value of the joint estate between the parties. The liquidator, furthermore, motivated his decision as follows: *"….in the nature of this matter the transfers are involuntarily, and to the extent at least "forced' because it is not really a disposition or a transfer at arm's length by a willing seller or a willing buyer but a division brought about by a superior force, namely the breakdown of the marriage and the requirement in the law that the assets be divided."*

[14] The court *a quo* agreed with the liquidator's reasoning and stated that although the property is not on sale at the moment, it is a disposable asset which will require the transfer of ownership at a sale thereof.

[15] The appellant contends that the court *a quo* erred in its finding in this regard. In my view, the value of the assets of the joint estate must be determined by having due regard to the value it will contribute to the estate of each party. Furthermore, the value of each asset must be determined on the date of the division of the joint estate and not at some undeterminable time in the future. It is a fact that, at the time of the division of the joint estate, the property will not be sold and that the second respondent will retain the property without the impediment of *"an involuntary transfer"*.

[16] In the result, the second respondent's estate retains the property not at a forced sale value but at market value and the value of the property should be reflected as such in the final account.

Ground 2: Storage fees

[17] The liquidator included the storage fees incurred by the second respondent to store movable assets that were in his possession. The appellant objects to this item on the basis that the liability was incurred by the second respondent without consulting her and it was incurred after the division of the joint estate. This constitutes a serious inequity whereby an expense is incurred against the joint estate for the sole benefit or advantage of the second respondent.

[18] Furthermore, the appellant questioned the fact that the amount was paid by the second respondent. According to the appellant, the person that stored the

goods is a close friend and associate of the second respondent. in the result, the appellant objected to the lack of satisfactory proof in respect of this expense.

[19] The liquidator stated that it was in the interest of the joint estate that the movable assets be preserved and properly stored. If not, the assets had to be abandoned or might have been exposed to unnecessary risks and the elements of nature. The liquidator did not address the objection in respect of satisfactory proof of the liability.

[20] The court *a quo* found that the storage fees in the amount of R 2 500, 00 was justified, important and necessary for the preservation of the value of the assets. It is unclear on what basis the court *a quo* found that the amount of R 2 500, 00 was reasonable without any evidence to support the reasonableness of the fee. The court *a quo*, furthermore, did not address the objection in respect of the lack satisfactory proof that this expense was incurred by the second respondent.

[21] Neither the appellant not the liquidator referred to any legal principle insofar as the incurring of liabilities by one party after the division of the joint estate is concerned. I agree with the court *a quo* that an expense necessary to preserve the assets of the estate pending the finalisation of the account should be allowed. It is in the interest of both parties that the value of assets of the joint estate be protected.

[22] I am, however, of the view that satisfactory proof of payment of the expense should have been provided by the second respondent. This would have negated any notion of an inequitable division of the nett value of the estate. The appellant's averment that satisfactory proof was not submitted was not denied by the liquidator and in the result, this ground of appeal should succeed.

Ground 3: Impermissible and/or inappropriate incurrence of legal fees by the liquidator

[23] The appellant bemoans the fact that the liquidator obtained legal advice in respect of legal principles that apply to the division of the joint estate. Paragraph 26 of the powers of the liquidator is relevant in this regard and reads as follows:

"The right to engage the services of any suitable qualified person or persons to assist him in performing his obligations in terms hereof ***and****, in particular,*

determining the true and proper value of any asset of the joint estate including any interest or share in any close corporation, partnership, company <u>and/or</u> business and pay to such person the reasonable fees which may be charged by him." (own emphasis)

[24] The court *a quo* held that the use of the conjunction 'and' just before the phare 'in particular' clearly indicates that the appointment of professionals for determining the value of the assets is in addition to the wider powers to the appointment of professionals who can assist in the general performance of the duties of the liquidator.

[25] I agree with the court *a* quo's finding in this regard. It is, furthermore, significant that the parties agreed to appoint a chartered accountant as liquidator. In view of the aforesaid, it is inconceivable that the appellant expects the liquidator to be *au fait* with legal principles, which principles falls within the ambit of a totally different profession. This ground stands to be dismissed.

G*round 4: Incorrect allocation of liability in respect of levies*

[26] The court order specifies that the appellant will have access to the Emfuleni apartment and the second respondent to the St. Michaels property. The liquidator directed that each party is responsible for the levies, rates and taxes associated with the respective properties.

[27] The appellant objected to this direction and submitted that the liabilities attached to the Emfuleni apartment should be paid by the joint estate. This objection entails that the second respondent remains liable for the expenses in respect of the St. Michaels property whereas the joint estate is liable for the expenses of the property that was allocated to the appellant.

[28] The court *a quo* correctly found that it is fallacious to contend that the joint estate should only be responsible for the expenses incurred by the appellant.

[29] I agree that he appellant's view in this regard is untenable and Mr Hodge, counsel for the appellant, to his credit, did not pursue this ground of appeal with any vigour. The ground is meritless and stands to be dismissed.

Ground 5: Failure to include legal fees in final account

[30] The appellant contends that her legal expenses in the divorce action prior to the division of the joint estate should be included in the final account. The liquidator disagrees and submitted that the appellant should be liable for her

own legal fees because her attorney was mandated and instructed on her volition, not that of the joint estate. Furthermore, and in terms of the court order, the costs of the divorce proceedings were reserved.

[31] The court *a quo* held that it is not proper to pre-empt the determination of the reserved costs and to include such costs in the final account. The court *a quo* erred in this regard. The appellant's objection was directed at the liquidator's failure to allocate her legal fees incurred <u>prior</u> to the division of the joint estate.

[32] The only source available for the payment of the appellant's legal fees prior to the division of the joint estate was the joint estate. This ground of appeal is upheld.

Ground 6: costs

[33] The court *a quo* court held that both the appellant and the liquidator was partially successful and that the costs of the main application and review application should be paid out of the funds of the joint estate.

[34] The appellant contends that the court *a quo* erred in this regard and that the liquidator should have been ordered to pay the costs as he was wrong in certain instances, failed to resolve the objections of the appellant amicably and unnecessarily resorted to litigation.

[35] In order to consider this ground of appeal, it is necessary to have regard to the events preceding the launching of the application. The liquidator distributed the division account on 26 June 2019 to the parties. Thereafter, letters were exchanged between the attorneys acting on behalf of the appellant and the liquidator and meetings were held to address the appellant's concerns and objections in respect of the account.

[36] Having had regard to the objections and concerns the liquidator presented an amended final account to the parties on 15 October 2020. A correction notice in respect of the amended final account was forwarded to the parties on 28 October 2020. The appellant's attorneys send a notice of objection to the amended final account on 4 November 2020. The liquidator duly responded to the notice of objection in a comprehensive letter dated 27 November 2020. In the letter the appellant was, in view of the liquidator's detailed response, invited to withdraw the objection or if she was not amenable to withdraw the objection, the liquidator proposed the following: *"then we propose that within 30 days after the date of this letter your client as the applicant initiate a court application to*

challenge by review, as suggested in the court order, the account and to ask the court to give specific directions"

[37] The letter emphasised the importance to finalise the division which had been pending for a period of four years and proceeded as follows: *"the fact remains that if your client does not within either 30 days or a further agreed time, bring such review, it will leave our client no choice than for him to bring an application for a declarator .."*

[38] On 18 December 2020 the appellant's attorney responded via email as follows: *"Myself and my client do believe every effort should be made to avoid litigation. Accordingly, I propose that I address your aforesaid response and, thereafter, we can ascertain whether we can reach any form of compromise between the parties."*

[39] Contrary to the positive sentiments expressed during December 2020, the appellant's attorney in a letter addressed on 1 February 2021 stated that the liquidator *"doggedly"* defended his findings, that his response is *"indicative of a patent bias in favour of Mr Marques against my client"* and that no purpose will be served by engaging the liquidator any further. The liquidator was informed that the appellant will be consulting with counsel during the course of that week as to the appropriate course of action that should be taken by her.

[40] The letter clearly dispels any notion of further engagements, and the liquidator issued the main application on 23 February 2021.

[41] Save for the fact that the liquidator was not cited in his personal capacity, I am of view that the liquidator was prudent in the discharge of his duties, to launch the application. The terms on which the liquidator was appointed specifically provide for any of the parties to refer the matter to court to review and correct the account. If the parties were of the view that the liquidator should be held liable for the costs occasioned by a referral to court, they should have included an express provision to that effect in the terms of appointment. I, however, doubt that any likeminded liquidator would accept an appointment on such terms.

[42] In the result, I am satisfied the court *a quo* did not err in directing that the costs of the application should be paid by the joint estate. The costs occasioned by the counter application follows, for the same reasons, the same fate.

Costs

[43] The appellant submitted that the liquidator should not have opposed the appeal and that the costs of the appeal should be borne by the liquidator in his personal capacity. As stated *supra* the liquidator was not cited in his personal capacity and any cost order granted against him in his *nomino officio* capacity is a cost order against the joint estate. Insofar as the merits of the opposition is concerned, the liquidator's liability for legal costs incurred in the execution of his duties was at stake and it is inconceivable that any person in his position would merely sit back and risk the possibility of paying the legal fees from his pocket.

[44] The costs of appeal will be paid by the joint estate. I am of the view that the complexity of the matter justifies counsel's fees on Scale C.

Order

The following order is granted:

1. The appeal is upheld to the following limited extent:

   1.1 The order of the court *a quo* dated 31 January 2022 is amended by including the following paragraphs:

   "2.5 Using, in accounting for the valuation of the property situated at S[...] M[...] M[...], Unit 6[...] A[...], Uvongo, Kwa-Zulu Natal, the market value thereof;

   2.6 Excluding the costs incurred by the second respondent in respect of the storage fees of movable assets;

   2.7 Including as a liability, in the reckoning of the joint estate, the legal fees of Steve Merchak Attorney incurred prior to 18 October 2016."

2. The costs of the appeal to be paid from the joint estate. Counsel's fees on Scale C.

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION

DATE OF HEARING **:** 26 November 2025

DATE OF JUDGMENT **:** 26 January 2026

APPEARANCES

Counsel for the appellant: DS Hodge

Instructed by: Steve Merchak Attorney

Counsel for the first respondent: MP van der Merwe SC

Instructed by: Jarvis Jacobs Raubenheimer Inc