**IN THE HIGH COURT OF SOUTH AFRICA**

**FREE STATE DIVISION, BLOEMFONTEIN**

Case No: **1105/2019**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

**SHERIFF, BLOEMFONTEIN EAST** Applicant

And

**LEON PIETER LATEGAN** First Claimant

**COLVOR INTERNATIONAL TRUST** Second Claimant
(IT 1[…])

**CORAM:** HEFER AJ

**HEARD ON**: IN CHAMBERS

**DELIVERED ON:** 25 JANUARY 2024

[1] The subject matter of this interpleader is shares to the value of R1,000,000.00 in Seliba Nokeng (Pty) Ltd (**"Seliba"**).

[2] During May 2019 First Claimant obtained judgment against Quad Ostrich Farming (Pty) Ltd, Colin John Vorster and Janette Elizabeth Vorster.

[3] In terms of a warrant of execution, the Applicant executed the writ and the warrant was served upon Janette Vorster (**"Mrs Vorster"**) personally on 7 November 2019 and the return in respect thereof records that the Applicant:

> *"Did attach the shares of Janette Elizabeth Vorster in Seliba Nokeng Eiendoms.*
>
> *A share certificate has been requested, but not yet received."*

[4] Although the share certificate could not be handed to the Applicant, at the time of execution, Mr Colin Vorster, the husband of Mrs Vorster, confirmed on the 12th of November 2019 that Mrs Vorster is the owner of the shares and that he will obtain the share certificate.

[5] The Applicant subsequently managed to obtain a copy of the share certificate in respect of the shares held by Mrs Vorster from the duly appointed accountants for Seliba, being Forte Accountants.

[6] A sale in execution by way of public auction was arranged to be held on 14 July 2021 at the offices of the Sheriff, Bloemfontein East.

[7] On the 12th of July 2021, the Second Claimant, through Mrs Vorster, deposed to an affidavit stating that Colvor International Trust is the owner of the shares held in Seliba.

[8] First Claimant disputes the Second Claimant's claim of ownership.

[9] A trustee of Second Claimant is the same Mrs Vorster against whom judgment was obtained. According to the First Claimant, on numerous occasions throughout 2018 as well as 2019 not only Mrs Vorster herself, but also her husband Mr Vorster as well as the legal representative of Mr and Mrs Vorster as well as a letter by Forte Accountants, confirmed that Mrs Vorster owns the shares in question.

[10] In a sworn affidavit deposed to by Mrs Vorster on the 12th of July 2021, she confirmed that she is one of two trustees of the Colvor Trust and that this Trust is the shareholder of 50% shares of Seliba. Subsequent to this affidavit, Second Claimant has previously been requested to provide documents and/or information substantiating its claim which the Second Claimant has failed to do.

[11] In support of its claim Second Claimant relies on a share certificate dated 5 November 2018 evidencing that the trustee for the time being Colvor International Trust is the proprietor of 50 ordinary shares in Seliba. This certificate was signed by Mrs Vorster only, allegedly in her capacity as director of Seliba.

[12] The Second Claimant claims ownership of shares that were in the possession of the judgment debtor, Mrs Vorster, where it was attached by the Sheriff at the behest of the judgment creditor, the First Claimant.

[13] In **Ebrahim v Deputy Sheriff Durban and Another[1]**, Henning J said as follows:

> *"The test whether the claimant has discharged the onus of proving his ownership to movable property which is not in his possession, is whether, in a result, the probabilities are balanced in his favour."*

[14] Mr *Van der Merwe*, who appeared on behalf of the First Claimant, is correct in his submission that the Second Claimant must discharge the onus of proving its claim to ownership of the shares.[2]

[15] The Second Claimant has elected to present evidence and discharge its onus only by means of affidavit. The main points advanced in the Second Claimant's Particulars of Claim are:

(i) That the limited Deed of Surety underlying to the judgment debt has been extinguished; and

(ii) That it owns the shares as the shares were *"legally acquired by it from Mrs Vorster"*.

[1] 1961 (4) SA 267 (D).
[2] Greenfield NO v Blignaut and Others 1953 (3) SA 597 (SR) at 598 C – D.

[16] These two points will be dealt with in what follows under two separate headings.

The liability of Mrs Vorster in terms of the Deed of Suretyship:

[17] The Second Claimant argues that Mrs Vorster has been released from her liability arising out of the Deed of Suretyship or that such liability has been extinguished.

[18] For this contention, the Applicant relies upon the fact that because a certain amount paid to Messrs McIntyre Van der Post Attorneys, being the legal representatives of the First Claimant, together with the proceeds of two auctions which was held at which various assets belonging to Mrs Vorster were sold in execution, exceeds the limited amount in respect of which Mrs Vorster is liable for in terms of the Deed of Suretyship upon which judgment was granted, Mrs Vorster's liability in terms of such suretyship and judgment had been extinguished.

[19] In answer to these allegations, Messrs McIntyre Van der Post Attorneys filed a supplementary affidavit explaining in detail how the amounts received have been appropriated and showing that Mrs Vorster still remains liable and indebted to the First Claimant in the amount of approximately R1,200,000.00 excluding interest and costs.

[20] Irrespective of the latter, of importance is the fact that Mrs Vorster in her personal capacity is not a party to the present proceedings. If Mrs Vorster's liability under the Deed of Suretyship is in dispute she should have approached the Court herself for appropriate relief in this regard, e.g. a declaratory order.

[21] The Second Claimant has merely an indirect or financial interest in the subject matter of such dispute as opposed to a direct and substantial legal interest therein that could be effected prejudicially. In this regard Mr *Van der Merwe* referred me to the matter of **Henry Viljoen (Pty) Ltd v Awerbuch Brothers**[3] and **United Watch & Diamond Company (Pty) Ltd and Others v Disa Hotels Ltd and Another**[4]. Although these two matters do not deal with interpleader proceedings, the principles contained and discussed in both cases, can be applied to in the present matter.

[22] Whereas the First Claimant indeed has an indirect or financial interest in the subject matter in that ownership of the shares in question might have a financial impact on Second Claimant, a claimant in an interpleader, cannot use the liability of a debtor in regards to which the interpleader is applicable, to establish or prove its claim in such interpleader. The present interpleader is only in regards to the rival claims to the Trust shares and in particular ownership of such shares.

[3] 1953 (2) SA 151 (O).
[4] 1972 (4) SA 409 (C) at 417 B – C.

[23] The Second Claimant's argument and contentions in this regard must therefore be dismissed.

Had the shares been donated / transferred to the Second Claimant?

[24] According to Adv *Pieterse*, counsel on behalf of the Second Claimant, the crux of the matter is simply this:

(i) On 6 June 2016 Mrs Vorster obtained shares in Seliba.

(ii) On 5 November 2018 Mrs Vorster donated her shares to the Second Claimant being the Trust for her children's benefit. According to her, the Second Claimant's ownership is duly proved by the share certificate dated 5 November 2018.

(iii) There was an order handed down on 9 May 2019 against *inter alia* Mrs Vorster in her capacity as Third Defendant.

(iv) The Applicant, based on an outdated share certificate of 2016, attached the shares purportedly belonging to Mrs Vorster in execution of the warrant of execution issued under the main action to sell on auction the shares and use the funds for the judgment debt.

(v) The First Claimant makes averments that Mrs Vorster is still the owner of the shares based on hearsay evidence and an outdated share certificate which cannot be sufficient proof of ownership.

(vi) The Second Claimant submits that the shares no longer belong to Mrs Vorster and were denoted the Second Claimant prior to the order being granted.

(vii) The Applicant has in its possession an outdated share certificate of 2016 and cannot attach the 50% in Seliba as it belongs to the Second Claimant and no judgment was obtained against the Second Claimant to execute a warrant against.

[25] As indicated in **Ebrahim v Deputy Sheriff Durban and Another (*supra*)**, the test whether a claimant has discharged the onus of proving his ownership to movable property which is not in his possession is whether the probabilities are balanced in his favour. The claimant is to produce clear and satisfactory proof of his ownership.

[26] It must therefore be considered whether the Second Claimant did in fact produce such clear and satisfactory proof of its ownership and whether the probabilities favours the Second Claimant.

[27] According to the Applicant, the share certificate (2016 certificate) which shows that the Seliba shares are in the name of Mrs Vorster, was obtained from the accountants of Seliba being Forte Accountants.

[28] In response to this, the Second Claimant in this regard answers as follows:

> *"I further deny that the accountants of Seliba could have had the correct and updated share certificate. On 1 November 2018, a meeting was held by Seliba's shareholders being myself and Mr Jan Hendrik Boshoff and the resolution was accepted that* *__all__* (own emphasis) *shareholding certificates were to be collected from Forte Rekenmeesters and held in own personal safekeeping. I append hereto the resolution as 'SC3'. The certificates were collected thereafter and since then, the relevant and updated share certificates of Seliba have been in the director's safekeeping and not the accountants."*

[29] It is unclear why such resolution was indeed necessary at that stage. Be it as it may, referring to *"all shareholding certificates"* the proposition advanced by the Second Claimant, means in effect that both the 2016 as well as the 2018 share certificates must have been in possession of Forte Accountants. It is undisputed that the Sheriff obtained a copy of the 2016 share certificate from the said Forte Accountants. The question immediately arises why Forte Accountants were then not also in possession of a copy of the 2018 share

certificate. The reasonable inference is that such accountants would have had a copy thereof at least whereas, on the version of the Second Claimant itself, by implication the 2018 share certificate was to be collected from Forte Accountants.

[30] Furthermore, in this regard, on the version of the Second Claimant itself, *"… the relevant and updated share certificates of Seliba have been in the directors' safekeeping and not the accountants".* On the version of the Second Claimant, it must be therefore accepted that the 2018 share certificate must have been in possession of Mrs Vorster who is, on the version of the Second Claimant itself, one of the directors of Seliba. On the version of the Second Claimant therefore, Mrs Vorster must have been in possession of the 2018 share certificate on the date of execution of the writ of execution, but it is common cause that she did not hand such certificate to the Sheriff nor did she draw the Sheriff's attention to the fact that the shares in Seliba are the property of First Claimant and not her own. In fact, it is undisputed that a mere two days before the sale of execution was to be held during July 2021, Mrs Vorster all of a sudden deposed to an affidavit stating that the Second Claimant is the owner of the shares. The question inevitably arises why Mrs Vorster did not give any indication in regards to the 2018 share certificate to the Sheriff in 2019 during execution of the writ. Is it because such 2018 share certificate was not in existence at the time?

[31] The Second Claimant and in effect Mrs Vorster, is, as far as the probabilities are concerned, confronted with a much more important factor.

[32] In the Second Claimant's answer to First Claimant's supplementary affidavit, deposed to by the same Mrs Vorster on 20 October 2023, the following was stated:

> *"I confirm that on 5 November 2018 when I donated my shares to the trust, I was a trustee of the trust. I was acting as a Donor in my capacity as shareholder in respect of and as a Donnée who accepted the donation on behalf of the trust."*

[33] However, in the Second Claimant's Particulars of Claim dated 13 April 2022, it was stated that Mrs Vorster has since 2011 been the sole trustee of the Colvor International Trust and that Mr Botha Barnard was later added as a trustee to the Colvor International Trust. In support of this allegation, the Second Claimant then refers to the Master's Letters of Authority dated 11 March 2021 which indeed shows that Mr Barnard and Mrs Vorster were at the time the trustees of the Colvor Trust.

[34] This allegation is then followed by reference to a copy of the Second Claimant's Trust Deed which is appended to such Particulars of Claim. This Deed of Trust shows that on the 29th of October 2011 the sole trustee of the Trust, was Mr CJ Vorster, apparently the husband of Mrs Vorster.

[35] In a letter relied upon by the Second Claimant, dated 22 August 2023, from the Master's office to Rosendorff Reitz Barry Attorneys, Mr Jansen from the Master's office, indicated that no amended letters of authority had been issued during 2011. He further states that only an amended Deed of Trust dated 29 October 2010 was lodged but no documentation pertaining to the appointment of a further trustee. Importantly, Mr Jansen further stated that the first activity on file was on the 11th of March 2021 when documentation was received pertaining to the appointment of the present trustees.

[36] In the Second Claimant's answer to the First Claimant's supplementary affidavit, Mrs Vorster then states as follows:

> *"From 2011 until date of deposing hereof, I was under the bona fide belief that I was the only trustee of the trust until Mr Botha Barnard was also appointed as a trustee during 2021. This was at all relevant times my instructions to my legal representatives as well. I only learnt on 22 August 2023 that my appointment as sole trustee of the trust was never effected during 2011 after my legal representative requested a copy of the letter of authority from the Master's office in support of this affidavit."*

[37] These facts are of threefold importance as will be evident from what follows.

[38] First of all it shows that where the Second Claimant pleaded in his Particulars of Claim that:

(i) *"Mrs Vorster has since 2011 been the sole trustee of the Colvor International Trust"* and;

(ii) *"Mr Colin Vorster does not bear knowledge of the innerworkings of trust and was never in a position to answer the question as to who the owner of the shares in Seliba Nokeng (Pty) Ltd are"*,

are patently false.

[39] Secondly, as correctly pointed out by Mr *Van der Merwe*, the belated admission by the Second Claimant that Mr Vorster was the sole trustee of the Second Claimant at the time of the alleged donation of shares to the Trust and that Mrs Vorster's claim that she believed herself to be the only trustee of the Second Claimant since 2011 and did not know that her husband was the sole trustee, is highly implausible and should be rejected as farfetched.

[40] Thirdly, and most importantly, the version by the Second Claimant that Mrs Vorster in fact accepted the alleged donation of the shares to the Trust during November 2018 as donnée in her capacity as trustee of the Trust can also not be correct and in fact not be true.

[41] The only document before Court in respect of Mrs Vorster being a trustee, is the Letters of Authority dated 11 March 2021 which shows at that stage she together with Mr Botha were the trustees of the Trust. There is nothing to show that before 2021 , Mrs Vorster was a trustee of the Second Claimant.

[42] The only person who could have accepted the alleged donation of such shares is Mr Vorster. The undisputed evidence is that Mr Vorster was however not only unaware of the transfer of the shares to the Second Claimant, but also informed the First Claimant's legal representatives that Mrs Vorster was the owner of the shares. The silence of Mr Vorster who did not present any evidence for purposes of these proceedings, as to the alleged donation and transfer of the shares to the Second Claimant, while he was the sole trustee of the Second Claimant, speaks volumes.

[43] The above facts, to say the least, do not support the probabilities in favour of the Second Claimant and one can only speculate in regards to the origin of the alleged 2018 *"share certificate"*.

[44] Coupled with the above, is the absence of any additional documentary proof regarding the alleged donation. In this regard, the Second Claimant did not provide any proof (e.g. financial statements) that the shares are recorded as an asset in the books of the Second Claimant, in spite of Second Claimant having been required to provide such supporting documents as early as August 2021.

[45] It therefore follows that it can not be found that the shares concerned were indeed donated to the Second Claimant where the acceptance thereof was not done by the then sole trustee , being Mr Vorster . The Second Claimant thus has failed to establish its claim in the interpleader proceedings and is liable for the costs in respect of thereof.

[46] It is trite law that a punitive cost order may be granted in the discretion of a Court where the facts presented to Court by a party is untruthful. The inference to be drawn from the facts presented by the Second Claimant, is that such facts relied upon by the Second Claimant are indeed untruthful and therefore warrants a punitive cost order. The use of the alleged 2018 share certificate was deceitful and intended to mislead the Court.

**<u>Order</u>**:

Therefore, I make the following order:

1. First Claimant's claim is upheld.
2. Second Claimant's claim is dismissed.
3. Second Claimant is to pay the costs of the interpleader proceedings on an attorney and client scale.

**J J F HEFER, AJ**

Appearances:

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|---|---|
| On behalf of the First Claimant: | Adv HJ van der Merwe |
| | Instructed by: McIntyre Van der Post<br>Bloemfontein |
| On behalf of the Second Claimant: | Adv MCM Pieterse |
| | Instructed by: Horn & Van Rensburg Attorneys<br>Bloemfontein |