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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 58823/2021

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

Date: 17 July 2023

Signature

In the matter between:

LUNGILE H. SHONGWE

1st Applicant

LUNGILE H. SHONGWE N.O.

2nd Applicant

And

FIKELEPHI A. MEYIWA

1st Respondent

REGISTAR OF DEED: PRETORIA

2nd Respondent

THE MASTER OF THE HIGH COURT:

JOHANNESBURG

3rd Respondent

JUDGMENT

SETHUSHA-SHONGWE AJ

Introduction

[1] This is an opposed motion application under part B in which Ms Lungile Happiness Shongwe, herein referred to as the applicant, brings the application in her personal capacity and as the executor of the deceased estate of Themba Joseph Shongwe (The deceased). The part A relief sought by the applicant was granted by agreement on 20 December 2021 wherein the 1st Respondent was interdicted from selling the immovable property pending the finalization of part B.

[2] The applicant seeks the following relief in terms of part B of the notice of motion:

- (i) “That the donation of R3 500 000.00 (three million five thousand rand) made by the deceased and used to purchase an immovable property on behalf of the 1st Respondent situated at 9[...] B[...] Street, Moreleta Park, Pretoria and known as erf 5[...] Moreleta Park extension 3[...] Township, Gauteng province, be declared null and void.
- (ii) That the immovable property aforementioned be sold and then proceed thereof be paid in the deceased estate of Themba Joseph Shongwe herein referred to as Mr Shongwe within 15 (fifteen) days of granting this order.
- (iii) Alternatively, prayer 2 above that the 1st Respondent pays to the deceased estate Mr Shongwe the sum of R3 500 000.00 received as a donation for the purpose of the property within 15 days of the granting of this order.”

[3] Ms Fikelephi Meyiwa herein referred to as the 1st Respondent is opposed to the application on the following grounds;

- (i) That the immovable property referred above was bought and registered in her name as their family home with the deceased.
- (ii) That the company assets used by the deceased to purchase the immovable did not form part of the joint estate with the 1st Applicant. The money belonged to the company as a separate legal entity. And that the applicant

doesn't have locus standi to sue on behalf of the company as a separate entity.

Background

[4] The Applicant and the deceased were married in community of property in June 1994. The marriage subsisted until it was dissolved by the death of Mr Shongwe. The deceased died on 28 July 2021 after a short illness in hospital.

[5] During the course of the marriage, the deceased and the Applicants acquired various businesses, including 311 Acquisitions (pty) Ltd. This company purchased and renovated properties prior to selling them. They each owned 50% half shares in all the companies. They were both directors, with the deceased being the managing director, while the applicant was also involved in the management running of the companies.

[6] On 15 November 2021, the deceased used the company's assets to purchase the aforementioned immovable property for the 1st Respondent. The property was purchased without the knowledge and consent of the applicant.

[7] The Applicant submits that the deceased is prohibited in terms of the marriage in community of property to donate monies belonging to joint estate to third parties in this instance the 1st Respondent without her consent. It is alleged that the monies belonging to 311 Acquisitions(pty) Ltd form part of the joint estate.

[8] Further, the Applicant submits that the joint estate between herself and the deceased has no financial obligation over the 1st Respondent, same applies to the business assets.

[9] The Applicant submits that she was not aware, nor had she consented to the donation made to the 1st Respondent. When the property was purchased, she made a further payment of R100 000 (one hundred thousand) to the conveyancers as per instruction of the deceased. She was informed by the deceased that they acquired the property for purposes of their business as usual. The company was not a complicated

and sophisticated business, it was a joint business of husband and wife with equal shares.

[10] The Applicant submits that the company being (pty) Ltd remains an asset in the joint estate between herself and the deceased. Therefore, the company's interest forms part of the assets within the description of assets under section 15 (2) (a) to (d) of the Matrimonial Property Act.¹

[11] The Applicant contends that the issue relating to the purported customary marriage was already dealt with on 30 July 2021 by the urgent application court before Van der Schyff J who concluded that the deceased and the 1st Respondent were involved in a cohabitation relationship and that the extra marital relationship between the deceased and the 1st Respondent was not a marriage. The 1st Respondent did not appeal the order by Van der Schyff J. The Applicant submits that the deceased could not have concluded a valid customary marriage whilst being a spouse in a subsisting civil marriage.

[12] The Applicant submits that the 1st Respondent and the deceased violated the provision of section 3 (2) of Recognition of the customary Marriage Act which state that, save as provided in section 10 (1), no spouse in a customary marriage shall be competent to enter a marriage under marriage Act of 1962 (Act No 25 of 1961) during subsistence of such customary marriage.

[13] It is the Applicant's contention that 311 Acquisition (Pty) Ltd Company belonged to both the deceased and herself. The deceased was never a sole director of the company and the benefit of the company belonged to both. As such any transactions performed on behalf of the company ought to have been authorized by herself as the deceased's wife and co-owner.

[14] The 1st Respondent contends that she lived with the deceased for a significant period of time as husband and wife in a customary marriage in which lobola was paid and the marriage was celebrated and she was introduced to the family of the Shongwe. The

¹ 88 of 1984.

Applicant was aware and approved the relationship between her and the deceased. The 1st Respondent dispute that the customary marriage between herself and the deceased was null and void as argued by the Applicant. She further denies that the urgent court before Van der Schyff J dealt with this issue pertaining to the customary marriage.

[15] The 1st Respondent argued that the matter should be referred to trial, to determine the existence of a customary union or lack thereof as opposed to motion proceedings on the basis that the applicant is raising issues relating to administration of estate and matrimonial law.²

[16] The 1st Respondent argued that the money used to purchase the property was the assets of the company and not of any individual member or joint estate and made reference to *Dadoo Ltd v Krugersdorp Municipality*³, the court found that the property vests in the company and cannot be regarded as vesting in any or all the members of the company.

[17] Further reference was made to *Salman v Salman Co Ltd*⁴, the court found that once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to it.

[18] 1st Respondent further argued that the joint estate that the applicants are placing reliance on section 15 (3) (c) of the matrimonial property Act, the court should find it to be misplaced. Thus the money used to buy the immovable property emanated from the company's cash assets.

[19] Further, section 15 (6) of the matrimonial property Act states that the provisions of paragraph (b), (c), (f), (g) and (h) of subsection (2) do not apply where an act contemplated in those paragraphs is performed by a spouse in the ordinary course of his profession, trade or business, as such, no consent was required from the 1st Applicant by

² Matrimonial Property Act 88 of 1984.

³ Dadoo V Krugersdorp 1920 AD.

⁴ *Salmon v Salmon CO Ltd* 1897 AC 22.

the deceased. The immovable property was purchased by the deceased in the ordinary course of his profession, trade and business.

[20] The Respondent submits further that the property doesn't qualify as a donation in terms of section 15 (3) (c) of the Matrimonial Property Act. In that the property was bought using the assets of the juristic person. The transaction cannot be null and void. The property was bought with intended purpose of being a home of the 1st Respondent and deceased as they lived together in a rented property as husband and wife. Irrespective of the 1st Respondent being a customary wife to the deceased, the couple were in a permanent relationship with full knowledge of the first Applicant.

[21] What is to be determined is whether there is a *bona fide* dispute of facts which needs to be ventilated by way of oral evidence in an action proceeding or whether the facts in disputes raised relates only to a point of law which can be determined in a motion proceedings.

Discussion

[22] It is trite law that where parties have a dispute about facts, the matter must be handled in terms of action proceedings. In *Frank v Ohlssons Cape Brewories Ltd*⁵ the court stated that where the parties' dispute is grounded merely on content of the law then they should pursue the shorter and comparatively inexpensive motion procedure.

[23] The famous case of *Plascon Evans Paints Ltd v Van Riebeck Paints (pty) Ltd*⁶ sets out the approach to determining the facts as follow;

"It is correct that, wherein proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before it is, however not confined to such situation. In certain instances, the denial

⁵ 1924 AD 289 at page 294

⁶ *Plascon Evans V Van Riebeck paints pty (Ltd)* 1984 (3) SA 623 A.

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, if in such case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5)(g) of the uniform Rules of court, and the court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers.”⁷

[24] The methodology for determining whether there exists a bona fide dispute of facts was set out in the case of *Wightman t/a JW v Headfour (Pty) Ltd and Another*⁸ where the court stated as follows;

[25] “[11] *The first task is accordingly to identify the facts of the alleged spoliation on the basis of which the legal disputes are to be decided. If one is to take the respondents' answering affidavit at face value, the truth about the preceding events lies concealed behind insoluble disputes. On that basis the appellant's application was bound to fail. Bozalek J thought that the court was justified in subjecting the apparent disputes to closer scrutiny. When he did so he concluded that many of the disputes were not real, genuine or bona fide. For the reasons which follow I respectfully agree with the learned judge.*

[12] Recognizing that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers . . . ”⁹

⁷ At 634H – 635C

⁸ *Wightman t/a JW v Headfour (pty) & Another* 2008 (3) SA 371 (SCA)

⁹ *Id* at para 11 -12

[26] Having considered the above authorities, the court has to consider whether the facts not in dispute, in their totality are sufficient enough to grant the order, if so then the court must grant the order. The court will then determine whether the disputed facts themselves constitute a genuine and real dispute of facts in circumstances where it is appropriate to do so.

[27] Turning to whether a valid marriage exists between the 1st Respondent and the deceased. The 1st Respondent clearly set out that she intends to challenge the constitutionality of the law as it stands as it does not recognize her union with the deceased. The issue whether the applicant was aware of the existence of this “customary union” is immaterial and it’s found not to be a serious dispute.

[28] The dispute of fact arises on whether the immovable property purchased for the 1st Respondent was a donation in terms of Matrimonial Property Act or it was a family home intended for her permanent stay with the deceased.

[29] A consideration is to be made whether the facts in dispute have a bearing on the facts not in dispute. The question is, can the payment be said to be a donation as provided in the Matrimonial Property Act?

[30] Section 15 (3)(c) of the Matrimonial Property Act provides the following;

“(3) A spouse shall not without the consent of the other spouse –

(c) donate to another person any asset of the joint estate or alienate such an asset without value, excluding in assets of which the donation or alienation does not and probably will not unreasonably prejudice the interest of the other spouse in the joint estate and which is not contrary to provisions of subsection (2) or paragraph (a) of this subsection”

[31] The Applicant relies on *Marais Maposa and Others*¹⁰ to make the point that an executrix has successfully been able to obtain the relief in similar circumstances. This is a case where a wife found out that her deceased husband had donated a membership interest in a business, she jointly owned with him without her consent. The Supreme Court of Appeal held that such a donation was invalid as it prejudices the deceased's wife by alienating the majority of the joint estate without value leaving very little in the remainder of the estate.

[32] In my view this matter is distinguishable from the *Marais* case mentioned *supra* in that in the current case the money is in dispute and it is the applicant's contention that the money used to purchase a house should be declared part of the joint estate. As opposed to Marais's case the issue was whether there could be said to be deemed consent in terms of section 15 (a) of the Matrimonial Property Act. The issue whether there was alienation of an asset belonging to the joint estate was common cause. Further the case was concerned with a membership interest of the company rather than an asset belonging to the company. The parallel in this case would be if the deceased had donated to the 1st Respondent the shares of the company 311 Acquisition (Pty) Ltd which belonged to the joint estate. That is not the case, in this matter it is money belonging to the company itself rather than an ownership stake in the company that must be looked at. For these reasons, this authority does not bind this court.

[33] In my view, the legal status of the assets belonging to the company in this instance 311 Acquisitions (Pty) Ltd, I find it to be a juristic person with all the powers of a person except to the extent that such power is limited as per Companies Act.¹¹

[34] The applicant as a 50% shareholder of 311 Acquisition (Pty) Ltd is a shareholder that is a holder of ownership rights of the company but not the assets of the company. See in this regard; Hoexter ACJ in *Stellenbosch Farmers Winery Ltd v Distillers Corporation (SA) Ltd*¹²

¹⁰ *Marais V Maposa & Others* 2020 (5) SA 111 (SCA)

¹¹ Frank 1924 AD 289 at page 294

¹² *Stellenbosch Farmers Winery Ltd V Distillers Corporation SA Ltd* 1962 (1) SA 458 A.

*“... Nor has a shareholder any right or title to any of the other assets belonging to the company. I refer to other assets, because the profits realised by the business of the company form part of its assets. The fact that the shareholder is entitled to an aliquot share in the distribution of the surplus assets when the company is wound up proves that he is financially interested in the success or failure of the company but not that he has any right or title to any assets of the company. In short, a shareholder has a proprietary interest in the company, but not in the business of the company. (See Gower on Modern Company Law, 2nd. ed. at p. 321; Macaura v Northern Assurance Co., 133 L.T.R. 152 at pp. 154 - 156; Goldberg, N.O v P. J. Joubert Ltd., 1960 (1) SA 521 (T)).”*¹³

[35] I therefore find that it is the shares that belong to the joint estate as part of the company.¹⁴ The applicant still holds her 50% share of 311 Acquisition (Pty) Ltd, the company and so does the estate of the deceased. As such it cannot be said that this immovable property amounted to a donation of an asset of the joint estate.

[36] However, there are instances where the separate legal personality may be ignored by a court. In the present case there is no such application made before me and those instances require the company itself to be party to the proceedings. This is not the case here. I therefore find that the applicant's reliance on section 15 (3) (c) of the Matrimonial Property Act is misplaced. I further find that the Companies exists as separate legal entities. Thus, it is a separation which I do not doubt that it aimed at providing benefits for the applicant and deceased in creating some distance between their estate and that belonging to the company. It is separation that exists both when it impairs the applicant. The assets of the company cannot be said to form part of the joint estate of the parties. They are not real rights owned by the estate in the same way the shares of the company are.

[37] Having considered all factors placed before me, the relief sought by the applicants is bound to fail. I make the following order:

¹³ Id at pp 471 – 472.

¹⁴ Section 1 of the Companies Act

[38] The application is dismissed with costs.

[39] The interdict granted against the 1st Respondent on part A is therefore discharged.

N.C. SETHUSHA-SHONGWE
Acting Judge of the High Court

Appearances

Counsel for the Appellant	: Advocate Kela (douglas@kelalaw.co.za)
Instructed by	: T Hadebe Attorneys
Counsel for the Respondent	: Advocate J.P Mthembu
Instructed by	: Langa Attorneys
Date of the hearing	: 05 May 2023
Date of judgment	: 17 July 2023

Judgment transmitted electronically