

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case no: **135/2019**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

B[....]2 B[....]

Applicant

and

F[....] D[....] B[....]

1st Respondent

LIZA KATHLEEN BOTES N.O.

2nd Respondent

(In her capacity as Trustee of the Mooigelegen Trust)

ANNA VAN WYK N.O.

3rd Respondent

(In her capacity as Trustee of the Mooigelegen Trust)

IN RE:

F[....] D[....] B[....]

Plaintiff

and

B[....]2 B[....]

1st Defendant

F[....] D[....] B[....]

2nd Defendant

(In his capacity as Trustee of the Frans B[....] Family Trust)

SAREL JOHANNES VENTER N.O.

3rd Defendant

(In his capacity as Trustee of the Frans B[....] Family Trust)

JUDGMENT BY: C REINDERS, ADJP

HEARD ON: 18 AUGUST 2022

DELIVERED ON: This judgment was delivered in open court on 11 October 2022 at 13h45 and thereafter distributed electronically.

[1] On 15 January 2019 the plaintiff in the main action (Mr FD B[....]) instituted divorce proceedings against the first defendant (Mrs B B[....]) under civil case number 135/2019, claiming a decree of divorce and ancillary relief. The parties were married in community of property on 25 March 2000. Mrs B[....] defended the action and filed a counterclaim praying, amongst others, for certain declaratory relief.

[2] Mr B[....] is cited as the first respondent in this interlocutory application, whilst Mss LK Botes and A van Wyk in their official capacities as the trustees of the Mooigelegen Trust, are the second and third respondents respectively. Mrs B[....] (as applicant) seeks to join the second and third respondents as the fourth and fifth defendants respectively in the claim in reconvention.

[3] The second and third respondents oppose the relief claimed on several grounds, praying that the application be dismissed with costs.

[4] The principles relating to an application for joinder is trite:

“...a third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such a party has waived the right to be joined.”

See: ***Amalgamated Engineering Union v Minister of Labour*** 1949 (3) SA 637 (A)

[5] Applicant in her founding affidavit states that she intends to amend her counterclaim in the main action by introducing a claim for a declaration that certain immovable properties purportedly held by the second and third respondents in their capacities as trustees of the Mooigelegen Trust, are those of the joint estate. She avers the basis for the application for joinder to be that the said trustees will have a direct and substantial interest in aforementioned declaratory relief sought.

[6] The background to the application is mostly common cause between the parties. During 2013 Mr B[....] was granted occupational disability benefits (“the benefits”) from an insurance policy and in tandem with the application for such benefits, he established the Frans B[....] Family Trust (“the B[....] Trust”). Mr B[....] and Mr SJ Venter are the trustees. A portion of the benefits were used to purchase four adjoining plots from the farm Ballyduff (the “Ballyduff properties”).

[7] The divorce action was set down and on 28 February 2021 when it was to commence, Mr B[....] was confronted with the proposition that certain loans that he had made to the B[....] Trust (in the aggregate of R 12 840 469.00) and the entity Spring Forest Trading 691 CC (in the aggregate of R 991 190.00) were purportedly assets in the communal estate. Mr B[....] moved for a postponement of the trial in order to amend his particulars of claim to the extent of introducing a claim for a declaratory order that the disability benefits fall to be excluded from the communal estate.

[8] From the papers it appears that, shortly after the aforementioned postponement of the divorce action, the Trust Deed of the Mooigelegen Trust was signed by the second and third respondents as trustees. On 8 April 2021 the Master issued a letter of authority to the second and third respondents. The trustees of the Mooigelegen Trust purportedly held a meeting on 13 April 2021 where it was decided that the Mooigelegen Trust would purchase portions 3, 6 and 7 of the farm. On face value the resolution that is said to have been passed at that meeting was signed on 9 April 2021. The Ballyduff properties were transferred into the name of the Mooigelegen Trust on 3 August 2021 (portion 3), 4 August 2021 (portion 7) and 21 September 2021 (portion 6) respectively.

[9] According to the applicant, the aforementioned sale and transfer of the Ballyduff properties came to her attention on 20 October 2021 when her attorney of record received a letter from Mr B[...]' former attorney. The letter revealed that certain assets, including the Ballyduff properties, were liquidated to enable the B[...] Trust and Spring Forest Trading CC to settle their loan accounts with Mr B[...].

[10] The respondents' grounds of opposition to the relief claimed by the applicant are based firstly thereon that the applicant (according to the respondents) conflates the grounds upon which she (as a defendant to the action) moves for the joinder of the Mooigelegen Trust and at the same time has failed to make out a case in the founding affidavit for the joinder of the said Trust. I was referred to the judgment delivered by Makgoka JA in **PAF v SCF** (788/2020) [2022] ZASCA 101 (22 June 2022) wherein the distinctness of the two remedies in respect of a claim that a trust is a sham on the one hand, and on the other hand a claim to pierce the corporate veil of a trust, was reiterated. It was submitted that the applicant in any event would not be entitled to the relief she seeks against the second and third respondents (with reliance on **PAF supra** at para [26]) on the basis that in the event it be found that the trust is a sham, no effect would be given to the transaction and the founder will remain the owner of the assets. The respondents lastly averred that there were no allegations or evidence of how the affairs of the Mooigelegen Trust, with reference to the terms of the Trust Deed, were conducted.

[11] From the papers the applicant seeks an order not only to join the second and third respondents as the fourth and fifth defendants, but wishes to introduce a claim for declaratory orders that the Ballyduff properties and any assets purportedly held by the trustees of the Mooigelegen Trust that were directly or indirectly purchased with the proceeds of a sale of these properties, form part of the communal estate. On behalf of applicant it was submitted that the second and third respondents have a direct interest in the matter and as relief is sought against the trust, they should be joined of necessity. I was referred to **VW v VW and Others** (627/2016) [2017] ZANCHC 26 (31 January 2017).

[12] Where a defendant wishes to join a party in a counterclaim it would need leave of the court to join such a party. Rule 24(2) of the Uniform Rules of Court regulates the procedure and the requisites for such joinder. From the discussion and authorities cited in Erasmus: Superior Court Practise Volume 2 at D1-313 [Service 8, 2019] it is evident that the merits of the matter do not play much of a role at this stage of the proceedings. Erasmus, with reference to case law, states:

“Entitlement to take action is not the equivalent of a *prima facie* case of potential success in an action against the persons concerned.”

See: **Hosch-Fömrdertechnik SA (Pty) Ltd v Brelko CC and Others** 1990 (1) SA 393 (W)

Put differently, the issue of joinder should not be conflated with the issue of whether the party seeking joinder has a good case against the party sought to be joined.

See: **Gordon v Department of Health, Kwazulu-Natal** 2008 (6) SA 522 (SCA)

[13] It is obvious that the defendant is in the position that it did not issue the summons. The essence of the application is to join with the purpose of obtaining a declaratory order as alluded to herein above. The respondents still have to plead and I need not say more.

[14] Having considered therefore the arguments by both parties (and I am indebted to the legal representatives for the ample and thorough arguments and assistance) the application should succeed and leave be granted to the applicant to join the second and third respondents as requested. Although the applicant prayed that any party opposing the relief claimed herein should be ordered to pay the cost of the application, I am of the view that costs should be in the cause.

[15] I therefore make the following orders:

15.1 The second and third respondents are joined as the fourth and fifth defendants respectively in the claim in reconvention in the divorce action under case number 135/2019.

15.2 Should the fourth and fifth respondents wish to defend the claim in reconvention, they are required to give notice of their intention to defend within 10 (ten) days of service of this order.

15.3 Costs to be in the cause.

C REINDERS, ADJP

On behalf of the applicant:

Instructed by:

Adv WA van Aswegen

Phatshoane Henney

BLOEMFONTEIN

On behalf of the respondents:

Adv JG Gilliland

Instructed by:

Sarel Venter Inc
c/o Azar & Havenga Attorneys
BLOEMFONTEIN