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IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division, Kimberley)

Saakno / Case number : **627/ 2016**

Datum verhoor/ Date heard: **24 / 01/2017**

Datum gelewer/ Date delivered: **31 / 01/2017**

In the matter between:

E. E. V. W.

Applicant

and

P. J. V. W.

First Respondent

J. V. W. NO

Second Respondent

I. H. V. W. NO

Third Respondent

P. J. V. W. NO

Fourth Respondent

J. H. C. NO

Fifth Respondent

THE MASTER OF THE HIGH COURT

Sixth Respondent

Coram: Erasmus AJ

JUDGMENT

ERASMUS AJ

[1] The applicant is the plaintiff and the first respondent is the defendant in a divorce action

pending in this court. The parties in the divorce action were married out of community of property with inclusion of the accrual system.

[2] The applicant lodged an application to join the second to fifth respondents, in their capacity as the trustees of the V. W. Family Trust ("the Trust"), as the second to fifth defendants in the divorce action. No relief is sought against the sixth respondent.

[3] The application is based thereupon that the Trust, in terms of a proposed amendment to the claim in the divorce action, will have particulars of a direct and substantial interest in the outcome of the divorce action.

[4] The applicant contended, and so it was alleged in the proposed amendment, that the Trust is the alter ego of the first respondent, with all the usual connotations such an allegation in divorce proceedings enjoins. The applicant specifically seeks a declaratory order that the assets, which are purportedly held in the name of the Trust, are those of the first respondent and that it forms part of his estate, subject to the accrual.

[5] Although the particulars of claim has not been amended to incorporate the allegations pertaining to the Trust, Adv Grobler, on behalf of the applicant and Adv Stanton, on behalf of the Trust, were in agreement and requested that the joinder application be adjudicated as if the amendments had been effected. I shall in this judgment refer to the amended particulars of claim.

[6] The issue before me is then whether the Trust has a direct and substantial interest in the relief sought in the amended particulars of claim in the divorce action.

[7] The Trust, and not the first respondent, opposed the joinder application. The second respondent deposed to the answering affidavit and the third, fourth and fifth respondents deposed to confirmatory affidavits.

[8] It is trite that it is open to a party to join any party against whom he or she believes a cause of action arises. The test is whether the party to be joined has a direct and substantial legal interest in the order the court might make. The interest will be direct or substantial if such order cannot be sustained or brought into effect without prejudicing the interests of the party.^[1]

[9] Mr Grobler's argument, in short, is that the Trust's opposition of the joinder application is premature as the merits of the applicant's claim in the divorce action should not be considered at this stage of the proceedings. He submitted that I am not required to determine at this stage of proceedings whether the applicant is correct in her allegations.

[10] Ms Stanton advanced several arguments pertaining to the applicants prospects of success in proving the averments contained in the particulars, more specifically that the first respondent had transferred his personal assets to the trust and/or whether assets held in the name of the Trust should be taken into account for purposes of calculating the accrual of the first respondent's estate in terms of section 3 and 4 of the Matrimonial Property Act, No. 88 of 1984.

[11] Although the arguments of Ms Stanton are not without merit, given the facts of this case and onerous burden the applicant will face during the trial,^[2] the issue of joinder should not to be conflated with the issue whether the party seeking joinder has a good case against the party sought to be joined. ^[3] I am thus not required to assess the merits of the applicant's claim in the divorce action. As long as the relief may be claimed against such a party, and the latter's interest may be prejudicially affected, joinder becomes necessary.

[12] The approach to be followed when adjudicating this application is similar to the approach to be followed when adjudicating an exception. It entails that the Trust has to satisfy the court that the relief, as pleaded in the amended particulars of claim, is bad in law and/or cannot be supported by any reasonable interpretation of the amended particulars of claim.^[4] I must

therefore accept the allegations of the plaintiff, as set out in the amended particulars of claim, as correct and determine whether these are capable of supporting a cause of action in respect of the assets of the Trust or, differently stated, whether in law it is legally competent to grant the relief.[\[5\]](#)

[13] In short, the allegations in the amended particulars of claim are:

13.1 The first respondent is a trustee of the Trust and had full control over the assets of the Trust at all relevant times after the establishment of the Trust;

13.2 The first respondent had bought the assets in the name of the Trust for his exclusive use and the assets held in the name of the Trust are in fact those of the first respondent; and

13.3 The applicant is entitled to a declaratory order to the effect that the assets purportedly held in the name of the Trust are the assets of the first respondent and form part of his estate.

[14] The remedy of piercing the veneer of a trust, as pleaded above, is well known and constitutes an equitable remedy that lends itself to a flexible approach to fairly and justly address the consequences of an abuse of the trust form when it is used in a dishonest or unconscionable manner to evade a dishonest or liability or an obligation .[\[6\]](#)

[15] The parties are married out of community of property with the application of the accrual system. It will be required of the trial court to determine the extent of the first respondent's estate for purposes of the applicant's accrual claim and further, whether the assets ostensibly held in the name of the Trust are in fact owned by the first respondent. It is open to the applicant to aver and claim relief as set out above. Such relief would be legally competent, if the facts to substantiate the averments are proven during the trial.[\[7\]](#)

[16] As stated earlier, I have to accept the applicant's allegations contained in the amended particulars of claim, as correct. Should the applicant be successful in her claims in the divorce

action, she will have the right to execute against any of the first respondent's assets in satisfaction of her accrual award, which could include assets ostensibly held in the name of the Trust, which the court finds to be beneficially owned by the first respondent.

[17] Although the right to share in the accrual only arises at the dissolution of the marriage,^[8] Mr Grabler and Ms Stanton were in agreement that, in this instance, the adjudication of the accrual cannot be conveniently separated^[9] from the divorce and the applicant's claim for maintenance. I am in agreement with counsel.

[18] There are issues common to both disputes and there is a reasonable prospect of an overlap of factual issues, should there be different trials. Separation in this instance would lead to a duplication of evidence and will not materially shorten the proceedings. The possible inconvenience the Trust might suffer in being a party during the adjudication of the divorce and maintenance claims can be adequately addressed with a suitable cost order, should the applicant not succeed in proving the claim which affects the Trust.

[19] I am satisfied that the Trust has a direct and substantial interest in the outcome of the divorce action and that the applicant has made out a case for the joinder of the Trust in the divorce action under case no. 627/2016.

[20] Ms Stanton submitted that, in the event of the application being granted, the costs of this application should be reserved for adjudication during the trial as the merits of the allegations pertaining to the Trust would only then have been fully canvassed. Although Mr Grabler, in the heads of argument, submitted that the Trust's opposition of the application was frivolous and that the Trust should be ordered to pay the costs of these proceedings, he correctly conceded during argument that the costs should be reserved to be adjudicated during the divorce action. I agree that the costs should be reserved.

Wherefore I make the following order:

1. THE SECOND, THIRD, FOURTH, FIFTH AND SIXTH RESPONDENTS BE JOINED AS THE SECOND, THIRD, FOURTH, FIFTH AND SIXTH DEFENDANTS IN THE DIVORCE ACTION UNDER CASE NUMBER 627/ 2016, PROVIDED THAT APPL CANT COMPL ES WITH THE PROVIS ONS OF RULE 28(1) OF THE UNIFORM RULES OF COURT WITHIN 15 DAYS OF DATE OF TH S ORDER.

2. ALL PLEAD NGS FILED OF RECORD SHALL BE SERVED UPON THE PARTIES JOINED IN TERMS OF PRAYER 1 WITHIN 15 DAYS OF DATE OF TH S ORDER.

3. THE COSTS OF TH S APPLICATION ARE RESERVED FOR ADJUDICATION DURING THE DIVORCE ACTION.

SL ERASMUS

ACTING JUDGE

On behalf of the Applicant: Adv. S . Grobler (oio Engelsman, Magabane)

On behalf of the Respondents: Adv. A. Staton (oio Haarhoffs Inc.)

[1] *SA Steel Equipment (Pty) Ltd and Others v LURELK {Pty} Ltd* 1951 (4) SA 167 (T)

[2] See *Mills v Mills* (332/2015) [2016] ZASCA 5 (9 March 2017)

[3] *Gordon v Department of Health, Kwazulu Natal* 2008(6) SA 522 (SCA); *YB v SB* supra paras [18] and [35]

[4] *Barnard v Barnard* 2000 (3) SA 741 (C) para [10]; *YB v SB and Others NNO* 2016(1) SA

(WCC) para [12];[26]; (56)-(60)

[5] *Stewart and Another v Botha and Another* 2008(6) SA 310 (SCA) para [4]; *YB v SB and Others NNO* 2016(1) SA (WCC) para [60]

[6] *Van Zyl & Another NNO v Kaye NO & Others* 2014(4) SA 452 (WCC) para [21]-[22]

[7] *WT & Others v KT & Others* 2015 (3) SA 574 (SCA)

[8] *Brookstein v Brookstein* (20808/24) [2016] ZASCA 40 (24 March 2016) para [16] ;*Le Roux v Le Roux* [2010] JOL

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[9] Rule 33(4)