

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

Case No: 4518/2012

In the matter between:-

TEBOHO VINCENT NTSOERENG
MOHOKOANE ANGELA NTSOERENG

1st APPLICANT
2nd APPLICANT

and

ANDRIES HENRY SEBOFI
AE FOURIE N.O (SHERIFF)

1st RESPONDENT
2nd RESPONDENT

JUDGEMENT: MOENG AJ

HEARD ON: 19 FEBRUARY 2015

DELIVERED ON: 19 MARCH 2015

- [1] This is an application for the rescission of a joinder order granted on 17 October 2013, in terms of which the second applicant was joined as second respondent in a Rule 46(1)(a)(ii) application. Applicant also seeks an order that the Rule 46(1)(a)(ii) order granted on 7 August 2014 , in terms of which the property described therein was declared specially executable, be rescinded and set aside.

- [2] The relevant facts can briefly be summarised as follows: the first respondent was the plaintiff in the main action whereas the first applicant was the defendant. First respondent issued summons against the first applicant during November 2012 and resultantly obtained default judgment in his favour after the latter failed to defend the action. A writ of execution against the first applicant's movable property was obtained but a *nulla bona* return was issued by the Sheriff. The first respondent resultantly issued an application in terms of Rule 46(1)(a)(ii) to declare the first applicant's immovable property specially executable.
- [3] It was only during the Rule 46(1)(a)(ii) proceedings that it transpired that the first applicant was married in community of property to the second applicant. This prompted the first respondent to issue an application to join the second applicant as second respondent to the Rule 46(1)(a)(ii) proceedings. On 17 October 2013, an order by agreement was granted by Monaledi AJ, joining the second applicant as second respondent to the Rule 46(1)(a)(ii) proceedings and on 7 August 2014, Lekale J declared the immovable property specially executable in terms of Rule 46(1)(a)(ii).
- [4] The applicants contend that both the joinder, as well the Rule 46(1)(a)(ii) order, was granted due to a mistake common to the legal representatives of both parties and the orders are as such rescindable in terms of the court's inherent powers under the

common law. They contend that both parties were under the misapprehension that a writ of execution against immovable property could be issued against the second applicant despite the fact that no judgment was entered against her. They further contend that the first respondent is guilty of fraudulent conduct as judgment was obtained against the first applicant in his personal capacity whereas same should have been obtained against T.V.N Transport and Projects CC. Mr Majola for applicants argued that it was peremptory that second applicant should have been sued jointly with the first applicant in the main action. He however abandoned the fraud argument during deliberations.

- [5] It is trite that once judgment is given in a matter it is final and it may only be altered on appeal. The Judge becomes *functus officio* and may not ordinarily, except in limited cases where judgment was obtained by fraud or *iustus error*, vary or rescind his own judgment. The crucial issue is whether there was a mistake common to the parties which led to the joinder and Rule 46(1)(a)(ii) orders.

- [6] In Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another 1992 (4) SA 852 (A) the following was stated with regard to a mistake common to the parties:

‘...there must have been a ‘mistake common to the parties’. I conceive the meaning of this expression to be what is termed, in the field of contract, a

common mistake. This occurs where both parties are of one mind and share the same mistake; they are, in this regard, *ad idem* (see Christie *Law of Contract in South Africa* 2nd ed at 382 and 397-8). A mistake of fact would be the usual type relied on. Whether a mistake of law and of motive will suffice and whether possibly the mistake must be reasonable are not questions which, on the facts of our matter, arise.'

- [7] The mistake applicants rely on in *casu*, is not a mistake of fact but of the law. The purported mistake relates to the liability of the joint estate in a marriage in community of property where judgment was only obtained against one of the spouses. According to Christie *Law of Contract in South Africa* 6th ed at 343, It has generally been regarded as settled that a common mistake of law has no effect on the validity of a contract. The effect of this view in *casu* would therefore lead to the conclusion that even if the parties were under the mistaken belief that the joint estate was bound, applicants cannot get rid of their liability even if the legal position is different from what they thought initially.

- [8] In **Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd** 1972 4 SA 208 (E), Kannemeyer J held at 213 that:

'It is desirable, at this stage, to consider the legal position which arises when parties to an agreement are mutually mistaken as to its legal effects. In *Sampson v Union and Rhodesia Wholesale Ltd. (in Liquidation)*, 1929 AD 468 at p. 481, WESSELS, J.A., explained the position thus:

'The general proposition of law is that if you think the meaning of a clause is such and such, you cannot get rid of your liability when you discover

that the true legal meaning is different from what you thought, for you cannot be heard to say you did not know the law. And if the other party innocently expresses his opinion that the legal meaning of the clause is the same as you read it, then if both put a wrong legal construction on the clause you are still bound because the law is presumed to be equally within the knowledge of both parties.'

- [9] In contrast, Van Blerk JA in **Mouton v Hanekom** 1959 (3) SA 35 (A) at 39H-40A, permitted rectification for a common mistake of law. If rectification can be allowed in such circumstances then an anomaly lies in the refusal not to permit rescission where the parties languished under a mistake of law. (See Christie *Law of Contract in South Africa* 6th ed at 343). I should however pause to state that this aspect was not raised by either party during deliberations or in their heads of argument, I will therefore for purposes of the facts at hand, determine whether the purported mistake in law warrants rescission of the orders in question. What therefore has to be determined is whether second applicant's joinder and the resultant writ of execution against the immovable property was the result of an error common to the parties as no judgment was obtained against second applicant. First respondent maintains that there existed no common mistake relating to the legal position.
- [10] The judgment in *casu* was obtained against the first applicant in his personal capacity and although the applicants appear to take issue with the fact that judgment should have been obtained against T.V.N Transport and Projects CC, and not the first applicant in his personal

capacity, the said judgment has not been rescinded and the Rule 46)(a)(ii) order was granted on the basis of that judgment.

- [11] Mr. Cilliers correctly referred to **Bezuidenhout v Patensie Sitrus Beherend Bpk** 2001 (2) SA 224 (E) that an order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (**Culverwell v Beira** 1992 (4) SA 490 (W) at 494A - C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (**Bylieveldt v Redpath** 1982 (1) SA 702 (A) at 714). The first applicant was barred by an order issued by Van Zyl J on 30 January 2014 from proceeding with the application for rescission of judgment until the first respondent's costs in respect of a previous application was paid within 21 days from the date of service of the Taxing Master's allocator. These costs were not paid as aforementioned. Their attempted attack on the validity of the default judgment in these proceedings is therefore clearly aimed at raising an issue that has to be raised in the application for rescission, that they have been barred from proceeding with until the costs have been paid.

- [12] It is trite that both spouses in a marriage in community of property have equal powers with regard to the contracting of debts which bind the joint estate, and the management of the joint estate. A spouse in such a marriage may perform any juristic act with regard to the joint estate without the consent of the other spouse. This, however, is

subject to the provisions of section 15(2) and 15(3) of the Matrimonial Property Act 88 of 1984 ("the Act"), which curtails the powers of a spouse to bind the joint estate single-handedly in respect of certain specifically defined transactions. Even if a spouse binds the joint estate contrary to the provisions of the Act, and such a contract can be regarded as void according to the normal principles of the law of contract, section 15 (9)(a) of the Act safeguards the interests of such a bona fide third party if the provisions of the subsection are complied with. Such a third party will still be able to hold the contracting spouse and the joint estate liable to the contract.

- [13] One of the proprietary consequences of a marriage in community of property is that, during the subsistence of such a marriage, all the liabilities of either spouse become the joint liability of both spouses and therefore the joint estate. All the debts, incurred by either spouse, are therefore primarily debts payable by or out of the joint estate. In fact, section 17(5) of the Act explicitly states that a third party can always institute proceedings against the spouse who incurred the debt or both spouses jointly may be sued therefor. The main purpose of section 17(5) is therefore to safeguard creditors who deal with spouses who, unbeknown to those creditors, were married in community of property. This section aims at avoiding situations where defenses of joinder or non-joinder, as in *casu*, will be raised should action be instituted against the parties.

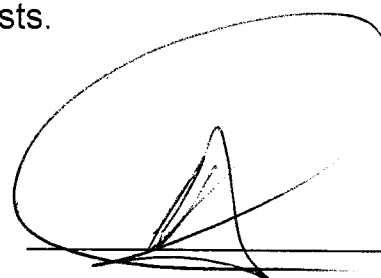
- [14] The defence raised by applicants' in the matter at hand is similar to the one raised in **BP Southern Africa (Pty) Ltd v Viljoen en 'n Ander** 2002 (5) SA 630 (O) wherein the wife contended that she was not liable for the debts owed by her husband, with whom she was married in community of property, because she was never sued by the applicant and the applicant had not obtained judgment against her. Hancke J held that it was clear from case law that the preferred view regarding the liability of divorced spouses previously married in community of property for debts incurred during the marriage was that the spouse who had incurred the debt was liable for the full amount outstanding, while the other spouse was liable for half the amount outstanding. The wife was thus liable for at least half the amount of the default judgment obtained against the husband irrespective of the fact that judgment was not obtained against her in person.
- [15] If the principles enunciated in **BP Southern Africa (Pty) Ltd v Viljoen en 'n Ander** *supra*, are applied in *casu*, and being mindful of the fact that the applicants in *casu* are not divorced, it is clear that a spouse married in community of property need not be joined in an action where the other spouse is sued for the joint estate to be held liable for the debts incurred by the 'guilty' spouse. It would in fact be absurd to sue a spouse that was not contractually or delictually liable to a plaintiff.

- [16] Mr. Majola placed reliance on **Weeks and Another v Amalgamate Agencies Ltd** 1920 AD 218 that a third party's goods cannot be taken in execution or attached and that such an attachment and sale would be illegal. Those facts are distinguishable from the facts in *casu*. The parties in **Weeks and Another** were not married to each other and there existed no joint estate, but the parties were private individuals.
- [17] The only conceivable reason why the second applicant was joined in *casu* was because, as occupant and co-owner of the property, she had an interest in the outcome of the Rule 46(1)(ii) application. Where an order is sought to declare immovable property specially executable, and that property is the home of a person, the court is enjoined to consider "all the relevant circumstances". It was therefore incumbent to join her. The sole object of the joinder was simply to establish whether her constitutional right to adequate housing was breached by the order that first respondent sought.
- [18] Further reliance was placed on the provisions of section 15(6) of the Act. It was argued that the liability was incurred "in the ordinary course of first applicant's business" and such liability was not for the joint estate. This argument is in my view misconstrued. Section 15 of the Act deals with the powers of spouses in a marriage in community of property, to perform juristic acts with regard to the joint estate, with or without the consent of the other spouse. Subsection (6) accords to a spouse acting in the ordinary course of his business, the power to

enter into transactions without the consent of the other spouse. As indicated above, the judgment has been granted against the first applicant and still stands until set aside by a court of competent jurisdiction. Such a defence, if meritorious, would best be raised in an application for rescission of judgment.

[19] I will therefore make the following order:

1. The application is dismissed with costs.

A handwritten signature in black ink, consisting of a large, sweeping loop on the left and a sharp, pointed stroke on the right, resting on a horizontal line.

L.B.J. MOENG, AJ

On behalf of the applicants: Mr. NN Majola
Instructed by:
MAJOLA ATTORNEYS.
BLOEMFONTEIN

On behalf of the respondents: Adv. HJ Cilliers
Instructed by:
SYMINGTON AND DE KOCK
BLOEMFONTEIN