FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1009/2009

In the matter between:

SHERIFF BLOEMFONTEIN-EAST	Applicant
ALETTA WILHELMINA GAINSFORD	First Claimant
CHRIS GAINSFORD	Second Claimant
and	
VALLOMBROSA TRUST, IT 638/2009	Third Claimant

HEARD ON:	14 JUNE 2013
JUDGMENT BY:	LEKALE, J
DELIVERED ON:	4 JULY 2013

INTRODUCTION AND BACKGROUND:

[1] These are interpleader proceedings launched by the applicant sheriff in terms of Rule 58(1) of Uniform Rules of Court for, effectively, determination, by this court, of who of the claimants have or has a valid and/or better claim in respect of a right of usufruct registered in favour of one **Francois Neethling**(Neethling) over the property of the third claimant and which has been attached, for sale in execution, by the applicant at the instance of the first and second

claimants (the joint claimants). The third claimant (the Trust) is a trust which has Neethling as one of its trustees. The joint claimants, on their part, are a married couple and Neethling's joint judgment creditors who seek to execute against him in his personal capacity.

[2] On 17 October 2012 the applicant attached the right, title and interest that Neethling has in and to registered usufruct no.K446/2009S on the strength of a writ of execution issued by the Registrar of this court dated 1 October 2012. The Trust, thereafter, laid claim to the usufruct in question, through an affidavit deposed to by Neethlingin his capacity as trustee, on the ground that it uses the same by agreement with Neethling, as the usufructuary, who placed it at its disposal by virtue of a "cession."

[3] The applicant, thereafter, initiated the present proceedings by, *inter alia*, calling upon the claimants to file particulars of their respective claims by no later than 17 May 2013. The claimants have since obliged with Neethling and his co-trustees submitting affidavits in support of the Trust's claim. The second claimant, on behalf of the joint claimants, made and submitted a deposition in support of the sale in execution of the attached usufruct on the basis that they have a judgment, against Neethling,which they are, in law, entitled to execute against such a usufruct.

ISSUES RAISED BY ADVERSE CLAIMS:

[4] The first question raised by the competing claims made is whether or not, on the papers filed, the joint claimants have a valid cause of action against the applicant in respect of the usufruct concerned with specific reference to whether the right of usufruct, as a personal servitude, is executable and can, as such, be attached and sold in execution of a judgment against the usufructuary.

[5] The second enquiry, which arises from the claims, is whether or not the Trust's papers set out a valid or enforceable legal claim against the applicant *vis-à-vis* the usufruct regard being had to the nature of the limited real right concerned which can, in law, only be ceded to the bare dominium owner and cancellation of the same is, further, registrable with the deeds registrar.

[6] The final question, which only arises for determination in the event of the above two questions both being decided in the affirmative, is who of the competing claimants has a better claim to the usufruct as attached by the applicant.

<u>THE JOINT CLAIMANTS' CONTENTIONS:</u>

[7] It is submitted for the claimants that they are entitled to have the usufruct attached and sold in execution because the judgment debt against Neethling amounts to R260 851.79 plus interest and the sheriff initially rendered *a nulla bona* return. The usufruct is alienable and executable in line with applicable case law. The right in question is an asset in the

hands of Neethling insofar as it gets valued in his estate. Rule 45(8) of the Rules provides for the procedure for the attachment of such a right which was followed to the letter by the applicant sheriff. There is no proof of “cession” furnished by the Trust in the form of registration of cancellation of the usufruct as required by section 68(2) of Deeds Registries Act 47 of 1937 (the Deeds Act). The usufruct is still registered in the name of Neethlingand is,as such, attachable and executable in his hands according to Mr Tsangarakis appearing for the joint claimants. Circumstances suggest that the alleged “cession” is, in fact, in favour of the close corporation which conducts business on the relevant property and of which Neethling’s wife is the sole member. Such a cession is, in law, void insofar as it is not in favour of the owner of the bare dominium and, it is probably for this reason, that the cession is not registered with the deeds registrar who cannot register the same because of legal impediments. If the Trust’s case is that Neethling only made available to it the use and enjoyment of the benefits flowing from the usufruct which it has, in turn, let out to the close corporation for rental, then and only in that event ,so submits Mr Tsangarakis, the usufruct is still available for sale in execution.There is, further, no proof of the alleged prejudice on the part of the Trust, in the form of loss of rental, if the alleged lease contract with the close corporation is cancelled due to the sale in execution of the usufruct. The Trust’s claim should be dismissed with costs.

CONTENTIONS FOR THE TRUST:

[8] Ms Wright submits that the Trust's case is, in fact, not based on the alleged "cession" when its claim is looked at properly. The claim, as it appears fromNeethling's first affidavit, is simply that the latter made the use and enjoyment of the benefits of the usufruct available toit as a quid pro quo for the improvements it made on the property and the general maintenance thereof. Such use and enjoyment of benefits of the usufruct is alienable while the usufruct, itself, is not according to the law. The Trust does not have to prove its claim in the instant proceedings. All that the law requires of a claimant is a statement, which does not even have to be an affidavit, disclosing a valid cause of action against the applicant. The extent of the Trust's claim is apparent *ex facie* the particulars of its claim. The usufruct is not executable insofar as it is inseparably attached to the usufructuary, who cannot even lease the same. The joint claimants' claim, thus, deserves to be dismissed with costs.

APPLICABLE LEGAL PRINCIPLES:

[9] The parties are correctly and effectively *ad idem* on the nature of a usufruct, as a limited real right creating a personal servitude in favour of its holder, over the property of another (*ius in re aliena)*.It attaches inseparably to the person of the usufructuary as against the property which belongs to another and is, as such, inalienable for its holder has no free hand in dealing with it.It only confers one aspect of ownership to the usufructuary*viz*. the use and enjoyment of the fruits and benefits deriving from the property leaving

the bare legal ownership of the property in the hands of another. The usufructuary's ownership extends to such use and enjoyment and he has an unfettered hand in dealing with the same once they have accrued to him. He is at liberty to sell, lease or in any manner whatsoever alienate the fruits and benefits flowing from the property once they have been severed from the tree or gathered by him. (See **Ex parte van der Watt** 1924 OPD 9 at 13- 17; **Durban City Council v Woodhaven Ltd and Others** 1987(3) SA 555(A) at 561G-J; **Zulu and Others v Van Rensburg And Others** 1996(4) SA 1256 (LCC) at 1263 D-E and **Vairetti v Zardo and Others** [2010] ZAWCHC I46 at para [17]).

[10] The usufruct, as a personal servitude, cannot be ceded to a third party and can only be ceded to the owner of the property over which it is created and exists as correctly pointed out for the joint claimants. (See **Durban City Council v Woodhaven Ltd and Others** (*supra*) at 562B-C and section 66 of the Deeds Act.)

[11] The transfer of a usufruct to a third party is authorised by section 69 of the Deeds Actonly where the owner of the property and the usufructuary act together in disposing of both the property and the usufruct to the same person. The two are also allowed to act in concert where either of them mortgages either the land or the personal servitude with the other submitting either the land or the usufruct as surety. A mortgaged usufruct contemplated in section 69 of the Deeds

Act is executable at the instance of the mortgagee.(See **Estate Grabe v Bornman& Another** 1938 OPD 127.)

[12] As correctly submitted for the Trust, a claimant in interpleader proceedings is only enjoined to ensure that the extent of his claim is apparent from the particulars of his claim so that it may be inferred, with reasonable certainty, that he has a genuine and legally enforceable claim to the disputed item. (See **Corlett Drive Estates v Boland Bank Bpk**1979(1) SA 863 (C) at 867F-H and **Kamfer v Redhot Haulage (Pty) Ltd and Another** 1979(3) SA 1149 (W) at 1153H.)

[13] Claims are adverse to the applicant if each claim, when proved, discloses a valid cause of action against the applicant. Any vested right or interest which a debtor is himself able to sell or dispose of for value is capable of attachment and being sold in execution for the benefit of a judgment creditor. (See **Nkwana v Hirsch**1956(2) SA (T) at 221H.)

[14] The Income Tax Act 58 of 1962 as amended and Estate Duty Act 45 of 1955 provide for valuation ofusufructuary and similar interests for donations tax and estate duty purposes. The valuation method generally involves capitalisation at 12 per cent of the annual value of the right of enjoyment of the usufructuary property over the expectation of life of the person receiving the benefit or such lesser period as the

usufruct may last. (See section 62 of Income Tax Act and section 5(1)(b) of Estate Duty Act.)

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS:

[15] The property attached *in casu* is effectively the right of usufruct itself as opposed to the use and enjoyment of the fruits and benefits of such a servitude insofar as the applicant sheriff's handwritten notice of attachment dated 1 October 2012 reads as follows:

> **"Lê beslag op die geregistreerde vruggebruik nr.K446/2009S van en ten gunste van Francois Neethling welke geregistreeris in die Aktekantoor oor Plot 7 Springbok LaanVallombrosa, Bloemfontein."**

[16]The answer to the first two questions herein lies, in my view, in the nature of **usufruct** as a personal servitude. It is inalienable and cannot even be bequeathed to his heirs by the usufructuary. The collaboration of the bare dominium owner is a*sine qua non* for transfer of the same to a third party and so is the case in the event of registration of a mortgage bond over the same. Although it confers full ownership (real right) over the use of the propertyas well as the enjoyment of the fruits deriving therefrom once the same are separated or accrue to the holder, it is limited, as a real right, in that it does not confer ownership of the property on the usufructuary, who is saddled with a fiduciary duty to preserve the substantial character of the same for restoration

or passing over to the bare dominium owner at the end of the usufructuary period. Once theusufructuary, as the authorised gatherer, has taken possession of the fruits, he is at large to deal with the same. He may sell, donate, lease or even throw away the pick at his will. He, thus, generally has no authority to give possession of or access to the property to anyone without the collaboration of the nude property owner. He serves as the conduit pipe for any third party wishing to enjoy the use and fruits of the relevant property. Such a person may enjoy the benefits and use the usufructuary property only through the usufructuary.

[17] Usufruct, as a servitude, embodies both fiduciary and real rights with the result that its attachment and sale in execution strike at both such rights. Mr Tsangarakis contends that it is executable and cites the decision in **Vos v Farmer**10 CTR 43 (Vos) in support of the joint claimants' view in this regard. The Trust's position, on the issue, is that a usufruct is inalienable and, as such, not executable. In Vos the court confirmed an order of attachment for sale in execution of a testamentary life interest in circumstances where the holder alleged that the same had been sold to another creditor. There was, however, no proof of delivery or transfer of the interest in question to the creditor concerned. The court granted the order but stayed execution for a month to enable such creditor an opportunity to set up any claim she might have had against the life interest concerned.

[18] The decision in **Vos** is, however, not a binding authority on this court insofar as it is a Cape Colony judgment. It is, as such, only of persuasive effect, if any, on me where I am sitting. The same applies to **Ex parte Barnardo's Trustees** 1910 CPD 78, also relied upon by the joint claimants, which indicates that a testamentary life interest in a farm was alienable, in the ordinary way, in the hands of the trustees of the insolvent holder thereof. It is, further, probable that the concept and meaning of life interest, as dealt with in those cases, was narrow and restricted to the use and enjoyment of the fruits excluding the fiduciary property. The aforegoing prevails when regard is had to the decision in **Estate Marincowitz v Marincowitz**1914 CPD 958 at 962 where it was held that

> "**It is quite possible to separate the life interest…from the obligation of… holding the land or property by way of *fidei commissum* in favour of the indicated beneficiaries;"**

[19] Decisions *in pari materia,* which are binding on me, emanate from the Appellate Division, as it then was, and this Court. In **Fourie v Munnik**1919 OPD 73 at 83 it was found that the use and enjoyment of the fruits of the property may be placed at the disposal of a third party. In **Ex parte van der Watt** (supra) at 13 the court notes

> **"…Now van Leeuwen (*CensuraForensis*, 2.15.14) - … points out that a usufructuary can sell his right to another …, but adds significantly, "it is not so much the right itself of using and enjoying, which passes to another, as that of taking the**

> **benefit of it; for the usufruct in itself cannot be transferred"… though he mentions that execution can be taken out against the usufructuarywith respect to the enjoyment of the fruits during the life-time ofthe usufructuary. Voet (7.1.32) has something to the same effect, and adds that it is like the case of things subject to a *fideicommissum….*"**(*My underlining for emphasis*)

[20] The Appellate Division, on its part, reiterated the nature of a usufruct as inseparable from the usufructuary and, further, as inalienable in **Willoughby's Consolidated Co Ltd v Copthall Stores Ltd**1913 AD 267 and **Durban City Council v Woodhaven Ltd and Others**(*supra*) and so has the Land Claims Court in **Zulu and Others v Van Rensburg and Others** 1996(4) SA 1236 (LCC) at 1263.

[21] In deed the use and enjoyment of the benefits of the usufructuary property are executable inasmuch as any vested right or interest, which a debtor is himself able to sell or dispose of for value, is capable of attachment and being sold in execution for the benefit of the judgment creditor. In general judgments for claims soundingin money can only be executed against the property of the judgment debtor. The question is, therefore, whether or not the usufruct in the instant matter is such a property *vis-à-vis*Neethling. Mr Tsangarakis answers in the affirmative insofar as he points out that usufructs get valuated. I am, however, not persuaded that they get valuated so much as assets in the estates of usufructuaries than, for tax purposes, as taxable dispositions in the hands of donors and taxable acquisitions

by those who benefit from cessation ofusufructs upon deaths of usufructuaries. The method of valuation involves determination of the annual value of enjoyment over the relevant property. In my view what gets valued are the enjoyment of the benefits and the use of the property which, in any event, are alienable in the hands of the usufructuary, as his property, and not the fiduciary interest which he has in the usufructuary property.

[22] The usufruct is not executable because it is not alienable in the hands of Neethling, as the usufructuary, in the same way that a *fideicommissary* property is not executable in the hands of the fiduciary. The law is, and has always been, that what is executable in the hands of the usufructuary are the use and enjoyment of the benefits of the property regard being had tocase law. The joint claimants, therefore, failed to disclose a valid cause of action against the applicant in relation to the attached usufruct. On the other hand, the Trust's claim is legally recognisable and enforceable insofar as it relates to the alienable use and benefits flowing from the property. The third question, therefore, does not arise for determination in these proceedings.

ORDER*:*

[23] The first and second claimants' claim is dismissed with costs inclusive of applicant's costs.

[24] The third claimant's claim is upheld with costs to be paid by the first and second claimants, jointly and severally.

L.J. LEKALE, J

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