

NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

Case no: EL872/2012
ECD 1972/2012
Date heard: 12 August 2012
Date delivered: 21 August 2012

In the matter between

CMB COMPONENTS ASSEMBLERS CC

First Applicant

BRIAN LINDILE NOMPOZOLO

Second Applicant

Vs

NIKIWE NOMAPHELO HONGO

Respondent

And

EZO MEYER ATTORNEYS

Garnishee

JUDGMENT

SMITH J:

[1] The applicants applied on an urgent basis for an order setting aside a writ of execution issued on 27 July 2012 in case no EL428/2010. The effect of the writ was to attach the sum of R378, 093 which was about to be paid into the trust account of the garnishee, Enzo Meyer Attorneys. The money is a portion of the proceeds of the sale of immovable property owned by the first applicant ("CMB Components"). CMB Components is a close corporation of which the second applicant ("Nompozo") is the sole member.

[2] When the matter was heard on 12 August 2012, I reserved judgment and ordered Enzo Meyer Attorneys to retain the money in their trust account pending delivery of my judgment.

[3] Nompozo and the respondent were divorced on 9 September 2011 in

terms of a decree incorporating a deed of settlement which provided, *inter alia*, that the respondent was entitled to be paid one half of the value of Nompozolo's member's interest and loan account in CMB Components.

[4] The deed furthermore provided for CMB Components to be valued in the following manner:

- (a) It would be valued as at the date of divorce;
- (b) Nompozolo was to provide the respondent with the books of account within one month of the divorce;
- (c) Nompozolo's auditors would provide a valuation of his member's interest, and in the event that respondent did not agree with such valuation, she would be entitled to appoint her own auditors to prepare a valuation.

[5] Nompozolo had failed to provide a valuation, and on 28 March 2012 the respondent obtained her own valuation from her auditors, Moore Stevens, Chartered Accountants. In terms thereof Nompozolo's member's interest was valued at R756, 186. It was on the basis of that valuation that the respondent proceeded to issue the writ in respect of her half share.

[6] Mr. Silandela, who appeared for the applicants, submitted that the respondent was not entitled to issue the writ because the valuation had not been finalised, and the respondent's claim was therefore not liquidated. He argued that the writ had therefore been issued prematurely, and falls to be set aside on this basis.

[7] Mr. Clark, who appeared for the respondent, on the other hand submitted that it was an implied term of the settlement agreement that if Nompozolo failed to provide a valuation, or to challenge the respondent's valuation, he would be deemed to have waived his rights in this regard, and the respondent's valuation would then become final.

[8] It is trite law that a writ can only be issued in pursuance of a court

judgment and in respect of a liquidated debt. Where the amount payable in terms of the judgment can only be ascertained after further legal issues had been resolved, the judgment debtor is not entitled to issue a writ. (**De Crespigny v De Crespigny 1959 (1) SA 149 (N) at 151.**)

[9] It appears that even though Nompozolo had failed to provide a valuation by his own auditors, he had all along disputed the respondent's valuation. As recently as 18 July 2012 he had sent an e-mail to the respondent's attorneys wherein he: attempted to explain the reasons for his failure to provide a valuation; challenged the bases on which the respondent's valuation had been prepared; and stated that he still intended to instruct his auditors to provide the valuation.

[10] Even if Mr. Clark is correct in his submission that it was an implied term of the deed of settlement that Nompozolo had to provide the valuation within a reasonable period of time, I am not persuaded that his delay was of such a nature that he should be deemed to have waived his rights in this regard. The contents of the email of 18 July 2012 in my view militate against such a conclusion. Though unconvincing Nompozolo's reasons for his failure to provide the valuation might have been, in my view the respondent was not entitled to simply unilaterally assume that her valuation had become final, and to issue the writ on that basis.

[11] Having said that, I must state that I am not entirely convinced that the application was *bona fide*. The applicants have been deliberately coy about the details of the sale transaction, and it is clear from the papers that Nompozolo had unfairly delayed the finalisation of the valuation to the respondent's detriment.

[12] Unfortunately the deed of settlement is silent on how this impasse is to be resolved,⁰ and no clear time frames had been prescribed. It was for this reason that I have considered issuing an order putting the parties on terms in this regard, and preserving the funds in the trust account of Enzo Meyer

Attorneys until such time as the valuation had been finalised. I am however of the view that, in the absence of a counter application to this effect, I would be exceeding the reasonable boundaries of my judicial authority if I were to make such an order *mero motu*.

[13] For these reasons I am constrained to find that the writ had been issued prematurely.

[14] In the result the following order shall issue:

- a) The writ of execution issued in case no EL428/2010; ECD928/2010 is hereby set aside; and
- b) The respondent is ordered to pay the costs of this application.

J. SMITH
JUDGE OF THE HIGH COURT

Appearing on behalf of applicants: Advocate Silandela
Instructed by: Jama Mama Attorneys

Appearing on behalf of respondent: Advocate Clarke
Instructed by: Drake Flemmer and Orsomond