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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 36025/09

ELANE VOSTER
(ID NO: [EDITED])

APPLICANT

And

STEPHANUS ERASMUS ALBERTUS VOSTER

(ID:[EDITED])

FIRST RESPONDENT

PHILIPUS JOHANNES JACOBUS VOSTER

(ID: [EDITED])

SECONDRSPONDENT

MADAKOR BOEDERY

(Reg No: 1992/015815/23)

THIRD RESPONDENT

JUDGMENT

[1] The applicant approaches this Court seeking an order that the matter be heard by way of urgency and that she be granted, *inter alia*, the following relief:

"(2) That, in terms of section 16(1) of the Matrimonial Property Act 88 of 1984 leave be granted to the applicant to bring an application on behalf of the communal estate;

(3) That the transfer of member interest of the first respondent in Mandakor Boerdery BK registration number 1992/015815/23 (Third Respondent) to the Second respondent, be set aside in terms of section 15(2)(c), alternatively section 15(3)(c) of the Matrimonial Property Act, 88 of 1984;

(4) That the first respondent's previous member interest in Boerdery BK (Third Respondent) be transferred back to the in the name of the applicant and the first respondent..

(5) That the communal estate of the applicant and the first respondent immediately be divided, to the effect that, but not limited only thereto, that half of the previous members interest of the first respondent in Boerdery BK (Third Respondent) be transferred to the applicant.

- (6) That the First and the Second Respondents pay the costs of this application."
- [2] The first issue I need to determine is whether the matter is urgent. If I find that the matter is urgent I then need to decide whether applicant has made a case for the relief she seeks.
- [3] The facts of this matter are briefly that the applicant and the first respondent got married to each other on 5 November 1994. The marriage, according to the applicant started to deteriorate in June 2006 and as the result issued divorce summons against the first respondent under case number 46689/07 .
- [4] The First respondent had 30% members interest in the Third Respondent (Madakok Boerdery), which were as the result of the marriage in community of property belonging to the joint estate of both the applicant and the first respondent.
- [5] The Second Respondent is the son of the first respondent from a previous marriage. Respondent is the owner of immovable property situated at Farm Riversbend (The Farm). The applicant attached a copy of the Deeds report dated 23 February 2009, which property was registered in the name of the Third Respondent on 12 June 1992.
- [6] It is common cause that that the First Respondent held 30% members interest in the Third Respondent, which members interest were transferred into the name of the Second Respondent on 26 October 2007.
- [7] According to the applicant, the first respondent sold to the second respondent the whole 30% members interest in the Third Respondent for an amount of R1.1 million in terms of which there was a set off in respect of the Second Respondent's immovable property situated at Erf 4184 Ellisras, X29 Town, situated at Waterlelies Street 68 Ellisras (The House) and that this immovable property will be transferred into the names of the applicant and the first respondent at the second transfer costs, as part payment and that the balance of R6 000. 00 will be paid by the Second Respondent at with 10% interest per annum.
- [8] The Second Respondent is the sole member of The Third Respondent. The house referred to herein above is registered in the name of the Kranskop Elektries CC (Reg No. 2003/0605546/23). It is further stated by the applicant that the Second Respondent is the sole member of Kranskop Elektries CC.
- [9] According to the applicant the aforesaid house was sold to both the applicant and the first respondent, as they are married in community of property, for an amount of R500 000. 00 and in respect of the payment of this amount a set off was done in respect of the 30% members interest in Madakok Boerdery CC. According to the Memorandum of Purchase Agreement the purchaser has already taken possession and occupation of the house.
- [10] The applicant's case is that she did not sign any document consenting to all the above mentioned transactions. She says that only the first respondent was involved in the negotiations and the conclusion of the agreements relating to the transfer of the 30% members interest in the joint estate of the property held in the Third Respondent, and also the Memorandum of Purchase Agreement.

- [11] She says that although she and the First Respondent moved into the aforesaid house during October 2007 and the Second Respondent relocated to the farm, it later transpired that the house is burdened encumbered with a bond in the amount of R675 000. 00, while its value is only R500 000. 00. She says that at all relevant times she was brought under the impression that the house will be transferred to them unencumbered. With regard to this assertion she conveyed to the Repsondents per her attorneys' letter dated 15 May 2009.
- [12] The applicant further avers that the Second Respondent and the entity Krasnkop Elekties CC, of which the Second Respondent is the sole member, are in financial straits and are not in a position to settle the bond registered over the house for cancellation thereof and consequently the house has not as yet been transferred into the names of the applicant and the respondent.
- [13] The applicant contends that the transfer of the 30% members interest is invalid by virtue of the fact that the members interest belonged to the joint estate and she never gave any consent for the disposition thereof. She contends in the alternative that, in the event I were to find that the agreements were valid, then because the Second Respondent failed to perform in terms of the agreements I should then find that the joint estate is entitled to cancel the agreements and claim restitution. She says that she has been unable to get the consent of the First Respondent to litigate on behalf of the joint estate
- [14] The applicant alleges further in her papers that the value of the 30% members interest is worth R3 800 000. 00. She says further that the First Respondent has to the prejudice of the joint estate sold the aforesaid 30% members interest for a mere R1 100 000. 00. She avers that in terms of section 20 of the Matrimonial Property Act just and equitable that she be allowed to litigate on behalf of the joint estate and that division of the joint estate be ordered.
- [15] With regard to urgency, the applicant contends that since she became aware of the futility of the agreements between the First and the Second Respondent, she has made several endeavours, for the protection of the joint estate' interest, to retrieve the members interest in vein. It has since come to her attention that the Second Respondent and the closed corporation in which he is a sole member, which is the owner of the property used as counter performance for the members interest in Madakor Boerdery, are in a critical financial straights. She further says that there are judgments obtained against Kranskop Elektries CC in the amount of R330 078. 00 and R152 146. 00 respectively on 15 January 2009 and 25 February 2009.
- [16] The applicant further avers that she has also personally determined that the Second Respondent owes large amounts of money which is now due and payable in the amounts of RR250 000. 00, R25 000.00 and R50 000.00. I must immediately point out that there are no supporting documents attached in regard to these averments.
- [16] The first salvo made by X on behalf of the respondents, is that the copy of the founding affidavit served on the respondents only bears the signature of the applicant, without it having been commissioned. The founding affidavit in the Court file bears the same signature of the applicant, and it has been commissioned on 15 June 2009. The inference to be made is that the commissioner must have commissioned the affidavit in the absence of the applicant, and that is not in accordance with

[17] Rule 6(2) of the Uniform Rules of this Court require that every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies." The court has a discretion to condone noncompliance with the rules. In the matter of Mynhardt v Maynhardt 1986 (1) SA 456 (T). The exercise of the Court's discretion will depend on the circumstances of a particular case, having regard, *inter alia* what prejudice would be suffered by the party who is offended by the non-compliance.

[18] In motion proceedings, the notice of motion together with the affidavit constitutes, the pleadings and the evidence in such proceedings. Such pleadings must be served on the opposite side, so as to enable him or her or it to know what case to meet. The respondents were made aware of the case they are called to meet, although the copy of the affidavit served on them was not commissioned. There is no prejudice they have suffered as the result of the fact that the copy of the affidavit served on them was not commissioned.

[19] The affidavit that has been filed in the Court file was commissioned. The submission on behalf of the respondents that I must infer that the applicant was absent when the commissioner attached his signature on the affidavit and that therefore the applicant did not take an oath. With regard to this submission, I take note of the fact that the commissioner is an attorney of this Court. I further take note of the fact that the matter was regarded as an urgent application. Generally in matters that are regarded as urgent, during the commissioning of the papers, it does happen that the commissioner would sign only the original document without attesting the rest of the copies. I do not for a single moment believe that an officer of this Court would simply commission a document of a stranger, without that deponent being present and risk prejudicing his profession for no good reason.

[20] Further the fact that the copy was not commissioned, that does not make the affidavit placed before me irregular thus warranting me to declare the entire proceedings a nullity, as was contended on behalf of the respondents. In the result, this point raised on behalf of the respondents is not upheld.

[21] In considering whether the application is urgent, I must bear in mind that:" Urgency does not relate to only to some threat to life or liberty; urgency of commercial interest may justify the invocation of the sub rule no less than any other interest¹.

[22] In the matter of Bopape and Another v Moloto 2000 (1) SA 383 at 386 the Maritz J. said:

"There is no reason to limit the remedies of an aggrieved spouse to the four corners of s15(9)(b) of the Act. There is no sound reason why an aggrieved spouse should suffer pending the possible eventual division of the joint estate, which may or may not come about. It may also be prejudicial to an aggrieved spouse to seek division of the joint estate in terms of s 20 of the Act. To accomplish a lawful donation or an alienation without value, the consent of both spouses is required. When it is clear that such consent is absent, the alienation cannot be lawful. In my view such alienation is void.

[23] It has been contended on behalf of the respondents that the matter is not urgent because the applicant moved to the house in October 2007. In my view, the important consideration is that she only became aware of the

¹ Vide Superior Court Practice of Erasmus [Service 31.2008] B 1-55.

essential facts in May 2009, when her attorneys directed a letter to the respondents' attorneys². She further says that it has since come to her attention that the first respondent and the third respondent are in dire financial straits. In urgent application the court can accept hear say evidence. She says that were the second respondent and the third respondent to be declared insolvent there is a risk of great prejudice because the joint estate would not recover what has been disposed illegally by the first respondent.

[24] Having regard to the potential financial prejudice that might be suffered by the joint estate and more in particular the applicant, I am of the view that the matter is sufficiently urgent that this Court should come to the rescue of the applicant. I also bear in mind the fact that the second respondent is the son of the first respondent, who is presently the sole member of the third respondent. He cannot be regarded as a complete outsider who was not aware of what was going on when the putative agreements were entered into between himself and the first respondent. It cannot be assumed that the applicant had given consent, especially in the light of the fact that there is no written document which has been produced by the respondents whereby the applicant granted her consent.

[25] I also bear in mind the fact that the house referred to herein above, belonged to Kranskop Elektries CC, which is not a party these proceedings. However, the second respondent had no authority to have entered into a set off between the first respondent in respect of the transaction relating to the second respondent and the third respondent. The fact that Kranskop Elektries CC has not been cited in these proceedings is of no

" Vie annexe 'EV9' cited at paginated 14 para 24.

moment because the house has not been transferred into the names of the first respondent and the applicant. In my view it was not necessary to have Kranskop Elektries CC cited in these proceedings.

[26] Because of the heavy urgent roll of this Court, it is not possible to prepare within the available time a judgment that deals with all the issues contained in the papers and the submissions that have been made. The fact that I have not chronicled what is contained in the answering affidavits of the respondents, does not mean that I have not considered these, but in fact I kept these in my mind as I considered this matter.

[27] In the result I find that the matter is urgent and that the applicant has made a case for the relief she seeks. In the result I make the following order:

- (1) That the application is urgent and that any deviation or non compliance with the prescribed rules of this Court in regard to form and time frames is condoned.
- (2) That, in terms of section 16(1) of the Matrimonial Property Act 88 of 1984 leave be granted to the applicant to bring an application on behalf of the communal estate;
- (3) That the transfer of member interest of the first respondent in Mandakor Boerdery BK registration number 1992/015815/23 (Third Respondent) to the Second respondent, be set aside in terms of section 15(2)(c), and section 15(3)(c) of the Matrimonial Property Act, 88 of 1984;
- (4) That the first respondent's previous member interest in Boerdery BK (Third Respondent) be transferred back to in the name of the applicant and the first respondent.,

- (5) That the communal estate of the applicant and the first respondent immediately be divided, to the effect that, but not limited only thereto, that half of the previous members interest of the first respondent in Boerdery BK (Third Respondent) be transferred to the applicant.
- (6) That the First and the Second Respondents are ordered, jointly or severally the one paying and the other to be absolved to pay the costs of this application.

N.M.MAVUNDLA

JUDGE OF THE HIGH COURT

HEARD ON THE : 30 / 06/2009 DATE OF JUDGMENT:

03/07/2009 APPLICANT'S ATTORNEY : JACQUES ROETS

ATTORNEYS

APPLICANT'S ADV : Mr. RESPONDENT'S

ATTORNEY : LOUW ATTORNEYS

RESPONDENT'S ADV : Mr.