



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Nos: 21464/2018 and
8526/2019

In the matter between:

**THE SHERIFF OF THE HIGH COURT,
CAPE TOWN WEST**

Applicant

and

TREVOR NORMAN FOSTER

Execution Creditor

and

CLEM PATRICK KIRST

Execution Debtor

IN RE:

NTSWAKI SEHUNELO

First Claimant

SHARMN NATASHA KIRST

Second Claimant

Coram: Justice J Cloete

Heard: 10, 11, 12 June 2024 and 16 October 2024

Delivered electronically: 28 November 2024

JUDGMENT

CLOETE J:

Introduction

- [1] These are interpleader proceedings in terms of uniform rule 58, where the Sheriff is the applicant and the execution creditor (Mr Foster) and second claimant (Ms Kirst) both lay claim to the value of movable property attached in execution. The first claimant's goods attached were released by agreement (she was the lessor of [...] M[...] Road, Camps Bay, where Ms Kirst resided at the time of one of the attachments). The third claimant, who is the execution debtor's mother and Ms Kirst's former mother-in-law, has not participated since she lacks the cognitive ability to do so. Ms Kirst and the execution debtor (Mr Kirst) were previously married to each other in community of property and were divorced on 14 October 2014.
- [2] Mr Foster, and Mr and Ms Kirst, were previously neighbours who lived across the road from each other. Various disputes arose between Mr Foster and Mr Kirst in relation to Mr Kirst's alleged behaviour. These disputes culminated in litigation between the two of them in this court. As a result of that litigation Mr Foster obtained three costs orders against Mr Kirst, and Mr Kirst one costs order against Mr Foster.

- [3] The following bills of cost were taxed in favour of Mr Foster, namely: (a) on 8 October 2020 under case number 17605/2018 in the sum of R149 389.62; (b) on 8 October 2020 under case number 21464/2018 in the sum of R37 603.65; and (c) on 12 May 2021 under case number 21464/2018 in the sum of R383 177.51. A bill of costs was taxed in favour of Mr Kirst on 18 May 2022 (seemingly also under case number 21464/2018) in the sum of R109 933.77. After set off, confirmed in writing, the balance still due to Mr Foster in respect of the third bill of costs, excluding interest, is R273 243.74, and the net effect of all of this, as far as could be gleaned from the papers, is that Mr Kirst is indebted to Mr Foster in the total sum of around R460 000 excluding interest.
- [4] On about 23 December 2020 the Sheriff executed two warrants of execution, in respect of the bills taxed in favour of Mr Foster on 8 October 2020, at [...] R[...] Heights, I[...] C[...] Place, Camps Bay and [...] T[...] Avenue, Camps Bay. On 4 January 2021, Ms Kirst laid claim to certain of the items attached. Mr Foster then instituted proceedings in the magistrates' court against Mr Kirst in terms of s 65 of the Magistrates' Court Act.¹ The s 65 inquiry was held on 15 June 2022, 21 July 2022, 28 July 2022 and 21 January 2023. Mr Foster did not attend that inquiry but was represented thereat by his previous attorney of record, Mr Van der Riet.
- [5] Between service of the first warrants and the s 65 inquiry, Mr Foster caused a further warrant of execution to be issued against Mr Kirst on 21 July 2021 in respect of the third bill of costs taxed in his favour on 12 May 2021. On 15 May 2023 and 23 June 2023 respectively, the Sheriff executed this warrant as well, at [...] R[...] Heights and Ms Kirst's rented premises, [...] M[...] Road.
- [6] Ultimately, of the items attached, Ms Kirst laid claim to 3 motor vehicles, 5 motorbikes/motorcycles, 5 bicycles, a trailer, 6 surfboards, 4 television sets, 4 computers and 2 office desks. Another vehicle attached by the Sheriff, a VW Polo, is registered in the name of her former mother-in-law, the third claimant.

¹ No 32 of 1944.

Ms Kirst does not lay claim to this vehicle although her evidence was that she purchased it.

- [7] Mr Foster and Ms Kirst subsequently agreed to the release of “her” items from attachment, subject to payment by her of R459 237.08 plus interest thereon of R94 507.82 to be held in the trust account of her attorney of record pending determination of the interpleader proceedings. This agreement was incorporated in an order granted by Henney J on 22 February 2024, and was complied with.

The parties’ pleaded cases

- [8] Ms Kirst pleaded that she is the owner of all the items to which she lays claim. She annexed registration documents pertaining to the motor vehicles, trailer and motorbikes, plus supporting documentation evidencing proof of purchase and payment for most items.
- [9] Mr Foster’s pleaded case was that at all material times Mr and Ms Kirst were in a permanent life partnership, alternatively a universal partnership, alternatively a partnership in terms of which: (a) they resided together as husband and wife in a common household ‘*bearing*’ income and expenses jointly; (b) they carried on business together and/or Mr Kirst carried on business in Ms Kirst’s name; (c) they acquired and held assets jointly but ostensibly in Ms Kirst’s name, alternatively Mr Kirst’s assets, while still owned by him, were ostensibly placed in Ms Kirst’s name; and (d) the purpose of recording and registering assets in Ms Kirst’s name was effected only ‘*...in order to frustrate the rights of creditors, more particularly*’ Mr Foster.

Onus, status of record of s65 proceedings, witnesses and overview of testimony

- [10] Although it was agreed that Ms Kirst bore the duty to begin, the affected parties (Mr Foster and Ms Kirst) could not agree on who bore the onus. I return to this later.

- [11] No agreement could be reached on the status of the record of the s65 proceedings. It was not referred to during Ms Kirst's testimony and Mr Foster, as previously stated, had not himself attended that inquiry. Mr Van der Riet confirmed the accuracy of the record during his evidence but given the absence of any application by Mr Foster in terms of s 3(1)(c) of the Law of Evidence Amendment Act² – despite his counsel being alerted to the need for such an application – that entire record is inadmissible and I thus do not deal with it.
- [12] Ms Kirst testified in support of her claim that most of the items were registered in her name, or the purchases had been invoiced to her and paid from her accounts. This much was not disputed. Furthermore, (a) no evidence was adduced (including by Mr Foster) of any creditors of either Mr or Ms Kirst whose rights could have been frustrated, apart from Mr Kirst being indebted to Mr Foster; and (b) Mr Foster did not adduce any direct evidence in support of his pleaded case, save for the following. First, Ms Kirst's affidavit testimony in unrelated proceedings as well as two confirmatory affidavits to which she had deposed in the earlier litigation between Mr Foster and Mr Kirst. Second, and this became common cause, Mr Kirst closed his only bank account holding R12 000 in credit in October 2019, and on 12 November 2019 transferred the Subaru vehicle and the trailer which were later attached into the name of Ms Kirst.
- [13] Mr Foster testified in support of his claim and called two witnesses, namely the Sheriff who effected the attachments, Mr Ntsibantu, and his previous attorney Mr Van der Riet. The evidence of these two witnesses was largely of a formal nature, but also included testimony about what occurred when the first set of attachments took place in December 2020. Given a concession made by Ms Kirst in cross-examination it is not necessary to deal any further with their testimony.

² No 45 of 1998.

[14] Save for the affidavits referred to above, Mr Foster's case was ultimately based upon inferences he had drawn from his own observations of how the Kirsts conducted their daily lives while they lived across the road from him; information he received from Ms Kirst's estranged brother-in-law, Mr Robert Wrench; and what Mr Foster had pieced together from his own investigation. It is against this background that I turn to deal with the evidence relevant to the main dispute.

Evidence on the main dispute

[15] Ms Kirst testified that she was born in London, where she also currently lives. Her parents reside in Monaco. Her father is a multi-billionaire and hotelier. She first came to Cape Town on holiday in 1995 where she met Mr Kirst and returned to South Africa later that year after becoming romantically involved with him. At the time Mr Kirst, who grew up on a farm in Namibia, was employed in the film industry.

[16] Ms Kirst did not have a work visa and enrolled at a hotel school where she completed three years of study. For as long as she could remember her father has paid her a monthly allowance, and this continued, in addition to which, when she had no funds of her own, her father paid all her other living expenses, including after she moved in with Mr Kirst and later married him (in community of property) on 17 November 1998. The couple have two sons who were born on 22 July 2007 and 13 March 2011 respectively.

[17] In about 2000 the couple moved to the United Kingdom and Mr Kirst started working for her father. However Mr Kirst and Ms Kirst's sister (who is married to Mr Wrench) did not get along which caused major problems within the extended family, in addition to which Mr Kirst did not fit into the corporate world. They thus returned to South Africa in 2004, initially living with Mr Kirst's mother in Camps Bay. However Ms Kirst wanted to enter the property market and possibly build a hotel herself one day.

- [18] She thus purchased a small property at 3[...] L[...] Street, Penzance Estate, Hout Bay which as far as she knew was registered in her name. From her evidence it was clear that Ms Kirst was unaware that in South Africa, where parties are married in community of property, registration of ownership of immovable property is reflected in the Deeds Registry in their joint names following the abolition of a husband's marital power by the Matrimonial Property Act³ on 1 November 1984. Mr Foster appeared to be unaware of this as well.
- [19] Mr Kirst made no financial contribution to the purchase of that property or the renovations which followed, but organised the labour required and manned the site. He was also not remunerated. This arrangement applied to the subsequent properties purchased and sold to which I refer hereunder.
- [20] After the renovation was complete Ms Kirst sold the Hout Bay property and purchased a townhouse at Woodhead Glen, Camps Bay. Because she did not have sufficient funds to pay the full asking price, and as a non-resident of South Africa could not obtain a mortgage bond, the bond was apparently registered in Mr Kirst's name. However Ms Kirst serviced all the monthly bond instalments without any financial assistance from Mr Kirst. This property too was renovated and thereafter sold. After a stint back in Hout Bay, Ms Kirst purchased a property at 4[...] H[...] H[...] Avenue, Camps Bay, financed also with a bond. Once it was renovated she rented it out and sold it a few years later to the existing tenant. She used the proceeds of the sale to settle the bond and put the rest away in her own savings.
- [21] By that stage the family was living (seemingly in accommodation paid for by Ms Kirst) at 1[...] P[...] Avenue, Camps Bay, next door to Ms Kirst's mother-in-law who assisted her with the children. From her evidence it appears that she and her former mother-in-law have a close relationship which continues to this day. (Ms Kirst also testified that she purchased the VW Polo for her and registered it in her name on 4 November 2022, despite the latter's declining

³ No 88 of 1984.

mental health and her prior admission to a care centre in May 2022, since she wanted her mother-in-law to retain a measure of independence and would drive around with her in the VW Polo in the Camps Bay area).

[22] Ms Kirst then purchased four plots in Milnerton which she believed to be an up-and-coming area and where a number of her friends lived. The plots were acquired in an entity, Oribel Properties (Pty) Ltd (“Oribel”), and they were built through West Cape Developers with Mr Kirst’s involvement being the same as before. The houses were built in stages and the overall cost financed both from Ms Kirst’s savings and ‘*a little bit of help*’ from the bank. Mr Kirst was neither a director nor shareholder of Oribel.

[23] Ms Kirst subsequently sold three of the four Milnerton properties, retaining 2[...] A[...] Crescent, Milnerton for the family to live in (they moved there in about 2011 or 2012). Thereafter the marriage between Mr and Ms Kirst broke down and they divorced on 14 October 2014. According to Ms Kirst their relationship changed after their younger child was born in 2011. In addition her sister and brother-in-law moved into the area and the family infighting started up again. In her words:

‘It just got too much. I walked away from my sister and I walked away from Clem and I moved back to Camps Bay... I left him in A[...]. He had nowhere else to go. He hadn’t been working for several years. He had no money so, I left him the house and my father rented me a house at number 1[...] F[...] Rd in Camps Bay... I wanted the children to have a place that they knew [i.e. the Milnerton property] so I didn’t want to take that away from them...’

[24] The Consent Paper incorporated in their Decree of Divorce reflects that Ms Kirst was the sole director and shareholder of Oribel (which was the registered owner of 2[...] A[...] Crescent); Mr Kirst would have a usufruct over the property; and once it was sold the full net proceeds would be invested for the children’s benefit.

- [25] After returning to Camps Bay (it would seem that the children still spent a lot of time with Mr Kirst as well), Ms Kirst started a small business importing costume jewellery which she ran for a few years. She explained that its purpose was not for any real financial gain but more to keep herself occupied. Mr Kirst had no involvement, which Mr Foster later confirmed in his testimony. Also, around 2014, Ms Kirst came across another development opportunity, a property comprising two plots with the residence portion at [...] T[...] Avenue, Camps Bay.
- [26] Her idea was to build a hotel on the plot that was empty. She was referred to various documents and email communications which confirmed her evidence that her father financed the purchase of this property. Although registration of transfer only took place in 2015, she moved to T[...] Avenue about two months after the divorce on 17 December 2014. According to her Mr Kirst assisted her and the children with that move, thereafter visiting the property very frequently to see the children and to help with them. On the rare occasion he stayed over. She also testified that she sold the remaining Milnerton property in 2016. Her father also paid for all of the plans etc in respect of the hotel which she intended to build, but it did not come to fruition.
- [27] In about August 2018, Ms Kirst purchased a further property at [...] R[...] Heights, [...] I[...] C[...] Place, Camps Bay. It was purchased, with guidance from her father, in a trust specifically created for the purpose of her acquiring immovable properties as investments. Her father put up the funds required for its purchase and Ms Kirst began operating it as an Airbnb through local agents. Again Mr Kirst had no involvement. This business ran very successfully (apart from during the Covid-19 pandemic) and she also lived there for a few months around the time the Sheriff made the first attachments in December 2020.
- [28] In 2019, Ms Kirst asked Mr Kirst to move into [...] T[...] Avenue to protect her and the children following a nasty incident at her home there. He took up occupation of the separate downstairs flat and also had free use of the large number of vehicles, motorbikes and the like which she had purchased (her

children are avid motorcyclists, cyclists and surfers and Mr Kirst too enjoyed most of these activities). Although they now resided again under the same roof, there was no question of them reconciling. During the few months she (and it would seem the children) stayed at the R[...] Heights property, Mr Kirst remained at [...] T[...] Avenue and looked after the pets.

[29] Over this period and thereafter, apart from her income from the Airbnb business (and a little from her jewellery business while it still operated), Ms Kirst's father continued to pay her allowance of £2 000 per month. In addition he paid all of the children's expenses and other expenses when she asked him to do so. Mr Kirst, who remained unemployed, made no financial contribution. Ms Kirst was referred to correspondence with her father in this regard which supported her testimony. In 2019 she had also decided to return to the United Kingdom permanently with the children.

[30] Although this plan later had to be put on hold when interference by her sister and brother-in-law (to whom Mr Foster, on his own version, was feeding information about the alleged activities at the Kirst home) caused severe tension between herself and her father, Ms Kirst did not want the children to see their father '*destitute on the streets*' and saw no reason why he should not spend as much time as possible with the children before her move back to the United Kingdom. She and the children eventually only left South Africa on 25 July 2023. Before leaving, both the T[...] Avenue and R[...] Heights properties were sold and she received the full net proceeds as agreed with her father. Mr Kirst accompanied her and the children to London to see the boys settle in and after a month he returned to South Africa.

[31] Ms Kirst gave detailed evidence about how each of the items attached by the Sheriff and to which she lays claim, were either paid for by her or her father, or a combination of their respective initial contributions. Two of these, the Subaru vehicle and trailer had previously been registered in Mr Kirst's name although she appeared unable to explain why. The same applied to another vehicle, a Mitsubishi Colt, which the Sheriff did not attach as he could not

locate it (it was stored along with another trailer in Clanwilliam where Ms Kirst kept her speedboat).

[32] When she was intending to leave South Africa towards the end of 2019 (an email to her father dated 5 November 2019 confirmed that the planned departure date had been 10 December 2019), because Mr Kirst had not made any contribution to the children's maintenance despite having undertaken to do so in the Consent Paper incorporated in their Decree of Divorce, he agreed to transfer the Subaru, Colt and trailer into her name in lieu of such payments. As previously stated it is common cause that these items were transferred into the name of Ms Kirst on 12 November 2019. Her evidence was further that she only discovered that an actual amount(s) was owing by Mr Kirst to Mr Foster in respect of the taxed bills of cost during 2022, when the attorneys attending to the transfers of R[...] Heights and [...] T[...] Avenue to the respective purchasers received an email from Mr Foster's attorney asking for Mr Kirst's whereabouts.

[33] Ms Kirst was referred to three affidavits to which she had deposed. The first was her founding affidavit in an application for the sequestration of the estate of a Mr Jonathan Sykes on 28 April 2023 in which she alleged that she and her '*husband*' Mr Kirst had jointly entered into an agreement with Mr Sykes for the sale of motor vehicles for profit, including that initially '*we*' made a good return. Her response was that her reference to Mr Kirst as her husband was an oversight and she had not regarded this as important at the time, her primary concern having been to secure payment of the sum owed solely to her as reflected in the written acknowledgement of debt annexed to her affidavit.

[34] Her evidence was further, as reflected in that affidavit, that it was she who was the plaintiff in an action instituted against Mr Sykes for payment of the same sum, resulting in default judgment against him, because only she had loaned him the amount in question. She maintained that Mr Kirst had no involvement in her financial dealings with Mr Sykes and also that the attorney who took instructions from her in the presence of Mr Kirst must have

mistakenly concluded they were jointly involved in that business since Mr Kirst *'did speak a little about what I had been through'*.

[35] The second and third affidavits were confirmatory ones deposed to by Ms Kirst in prior proceedings between Mr Foster and Mr Kirst, although only one of them appears to have found its way into the papers before this court. As I understood it, in both these affidavits Ms Kirst had confirmed the truthfulness of Mr Kirst's allegations, but only insofar as they related to her. Accordingly averments made by Mr Kirst in his affidavits that he was a self-employed businessman, the breadwinner of the Kirst family, and might have to sell *'my'* property at [...] T[...] Avenue, cannot properly be attributed to Ms Kirst, although she had confirmed his allegation that she was his wife at the time. Her explanation was that *'perhaps this was a typo. I don't know why he kept calling me his wife... I was confirming probably the rest of the affidavit rather than the comment of being his wife'*.

[36] Cross-examination of Ms Kirst elicited the following. She conceded that she misled Mr Ntsibantu (the Sheriff) when he arrived at the Rontree Heights property to effect the first attachment in December 2020, by telling him she did not know of Mr Kirst's whereabouts. She claimed that she did not want yet another altercation involving Mr Foster in front of her children. She also maintained it was the Sheriff who suggested Mr Kirst, who was present at the time, was her boyfriend, denying she had told him this as Mr Ntsibantu later testified.

[37] She also conceded she had been made aware by Mr Kirst that Mr Foster obtained *'a judgment'* against him with costs which he subsequently unsuccessfully attempted to have rescinded, but she stated this was the extent of her involvement in their litigation since she did not wish to be drawn into it. She had not funded any of Mr Kirst's own attorney's fees. She later testified that Mr Foster himself had emailed her demanding payment, but since it had nothing to do with her she was certainly not going to pay. When it was pointed out to her that Mr Kirst would have been made aware of the first taxation in about June 2019, at a time when he still had the vehicles and

trailer in question registered in his name, she replied that she thought this only had to do with the then pending s 65 inquiry, which could not have been the case since those proceedings were only instituted after January 2021. She also maintained the only reason why Mr Kirst closed his bank account in October 2019 was because he could not afford the bank charges.

[38] The divorce, she supposed, could be described as amicable. Mr Foster might, as he claimed, have been under the impression that she and Mr Kirst were married after she moved into [...] T[...] Avenue, but she did not consider her private life to be any of his business, and had not confided in him about her personal situation with Mr Kirst. She claimed to have been careless in her affidavits in the earlier proceedings and apologised for this. She denied that the Sykes acknowledgement of debt executed on 26 October 2022 reflected only herself as creditor since by then Mr Kirst was well aware he should have no assets (or claims) in his name. She stated it was because only she was owed the money and Mr Kirst never had assets save for the Subaru, Colt and trailer she previously bought.

[39] With regard to the VW Polo her evidence was that her former mother-in-law had owned a 20 year old Mercedes A Class which became very expensive to run. Ms Kirst thus bought her the VW Polo since it was '*cheaper, lighter and easier*'. The vehicle was registered in the name of her former mother-in-law since the latter wanted to retain her previous vehicle registration number of C[...].

[40] When asked why she had referred to Mr Kirst as self-employed in her divorce summons, she replied that her attorney at the time advised that '*this is sort of the normal how things are set up*'. According to her it was the same attorney who suggested that payment of maintenance by Mr Kirst for the children be included in their Consent Paper as a '*nominal figure just so that we could put something in there for the documents*'. The Consent Paper reflects that Mr Kirst would contribute to the children's maintenance as from 1 November 2013 by contributing towards their day-to-day, medical and educational expenses pro rata according to his means from time to time; and that pending

any process for determining the quantum thereof, he would pay R1000 per month for both children. When asked how she contemplated him ever paying, she replied *'I don't know, it didn't really bother me to be honest. I was self-sufficient, my father pays for most things, so really it wasn't an issue for me at the time'*. It was only when she planned to return permanently to the United Kingdom in 2019 that she felt Mr Kirst should at least give up the vehicles and trailer in lieu of unpaid maintenance since their proceeds would be *'better than nothing'*.

- [41] Regarding the transfer of the vehicles and trailer into her name in November 2019, she was asked what she thought Mr Kirst would drive once she sold them, to which she replied this was not her concern. It was suggested that it was most unlikely Mr Kirst would have put himself in that position. She responded:

'I was planning my own life, to start my own life again back home with my family, with my two sons and how he ran his life was no longer my responsibility any more... and he would have had to grow up and get a job like the rest of the world and fend for himself to be honest... He could have driven his mother's car if he needed a car that badly.'

- [42] I now turn to Mr Foster's testimony. He was not aware when Ms Kirst moved into [...] T[...] Avenue that she and Mr Kirst were already divorced. From his observations over an extended period of time they conducted themselves as a married couple. In addition, at some point, Mr Wensch contacted him to ask him to feed information about the Kirst's activities (which Mr Foster provided) and Mr Wensch told Mr Foster the Kirst divorce had been a sham. Mr Wensch was not called by Mr Foster to testify and accordingly no weight can be attached to this. Similarly, no weight can be attached to Mr Foster's testimony that in 2017 he came across the Kirsts at a restaurant in Camps Bay when they told him they were celebrating 21 years together, and that the Kirsts had jointly owned 10 immovable properties, since none of this was put to Ms Kirst when she testified.

[43] Mr Foster took the court in detail through the documentary evidence he had pieced together to support his view that the Kirsts pooled resources for joint profit, but ultimately, apart from the affidavit evidence to which I have already referred and external registration records, Mr Foster was unable to produce anything of substance to counter Ms Kirst's testimony about the actual sources of the funds she had accumulated. The gist of Mr Foster's testimony in chief is perhaps best summarised by the following evidence he gave:

'As I mentioned in the evidence and the items in examples referred to, they operated as a household where they conducted themselves together. The comingling of assets was taken to the extreme by the transfer of the very few items that were in his name and to suggest that one has no assets, no income and no liabilities and to have access to those assets and to have made those transfers before and after the marriage as is detailed from the totality of that, it indicates that it is irrational and improbable that it could be that you have absolutely no expenses, no income and that the truth is that if they are in collusion to portray otherwise, is as I stated here that they have comingled everything on paper in her name, but on proper analysis and detailing of the timing and the acquisition and utilisation and everything in totality, it is not credible...'

[44] During cross-examination Mr Foster accepted that *'the divorce was not specifically for me'*. He claimed that according to a *'record'* he had seen, Mr Kirst had been a director of Oribel at one stage, but did not know why this too was not put to Ms Kirst during her unchallenged testimony on this score.

[45] Mr Foster also accepted that 3 of the 4 Milnerton properties were sold (along with those acquired, renovated and sold before then) prior to the Kirst's divorce in October 2014. To this should be added that the W[...] Close, Camps Bay property was awarded to Ms Kirst in the divorce. He agreed that even when the last Milnerton property (2[...] A[...] Crescent) was sold in 2016 there were no issues between himself and Mr Kirst as yet. The Kirsts would thus not have needed to conceal any assets from him at that stage. He

accepted that Ms Kirst's father paid entirely for the acquisition of both the R[...] Heights and T[...] Avenue properties, and that after Ms Kirst sold 2[...] A[...] Crescent she did not purchase and renovate any other immovable properties for sale and consequent profit.

[46] As far as the transfers of the Subaru, Colt and trailer from Mr Kirst to Ms Kirst in November 2019 are concerned, Mr Foster agreed that the first order obtained in his favour was in October 2018 and the second in February 2019 (although the two bills of cost in question were only taxed in October 2020). According to Mr Foster, both Kirsts would have been aware, at the latest by February 2019, of the looming consequent costs for which Mr Kirst would be liable. He was unable to proffer any reasonable explanation why, in these circumstances, the Kirsts nonetheless waited over 8 months until November 2019 to take steps to put these vehicles and trailer beyond his reach.

[47] Mr Foster further testified that *'the funding, that was provided by the father, yes, but the profits of all the properties, my understanding from the evidence is that they directly benefited from it'*.

Whether Mr Foster or Ms Kirst bears the onus

[48] The legal position is conveniently summarised in Erasmus: Superior Court Practice⁴ as follows:

'The reasoning in the cases in which the onus of proof has been considered seems to indicate that, when the sheriff interpleads, the claimant ought to be made plaintiff if the goods at the moment of seizure were in the judgment debtor's possession, because his possession implies a prima facie title in him which enures to the benefit of the execution creditor; but if the goods at the moment of seizure were in the claimant's possession, he would have the prima facie title,

⁴ No 2ed, vol 2 at D1 Rule 58-3 to 58-4, with reference to *Bruce NO v Josiah Parkes & Sons (Rhodesia) (Pvt) Limited* 1972 (1) SA 68 (R); *Zandberg v Van Zyl* 1919 AD 302 at 308; *Gleneagles Farm Dairy v Schoombee* 1949 (1) SA 830 (A) at 836; *Ebrahim v Deputy Sheriff, Durban* 1961 (4) SA 265 (D) at 267D.

which the execution creditor would have to displace, and so the execution creditor ought to be the plaintiff.'

[49] In the present matter the items to which Ms Kirst lays claim were attached by the Sheriff at three separate addresses, namely [...] M[...] Road, [...] R[...] Heights and [...] T[...] Avenue. On a conspectus of the evidence given during the hearing, the only address which can safely be accepted as having been occupied jointly by Mr and Ms Kirst is [...] T[...] Avenue; and only two items were attached at that address, namely the Subaru and another vehicle, a VW Combi Transporter. It must therefore follow that Mr Foster bears the onus in respect of the items attached at [...] M[...] Road and [...] R[...] Heights, and Ms Kirst bears the onus in respect of the two items attached at T[...] Avenue.

Mr Foster's claim to the third claimant's vehicle (the VW Polo)

[50] Mr Foster's case is that unless the third claimant herself lays claim to her vehicle, or is represented by a curator ad litem for this purpose, his claim must succeed, given his "partnership" argument.

[51] This cannot be correct. On Mr Foster's own version, when Ms Kirst bought this vehicle for her former mother-in-law, the latter already lacked the cognitive ability to manage her own affairs. I also disagree with the submission made on behalf of Ms Kirst that this court is entitled to take account of her evidence in deciding whether Mr Foster has a claim to that vehicle on the basis that execution is a process of court, and this court has the inherent power to regulate its own process.

[52] Put simply, it is undisputed that the third claimant lacks the cognitive ability to defend the attachment of her vehicle. Ms Kirst herself lays no claim to it. If Mr Foster wishes to pursue the attachment of the VW Polo any further, he should approach court for the appointment of a curator ad litem to assist the third claimant in these interpleader proceedings, since only he and the third claimant are still affected by that attachment. In addition the Sheriff cannot reasonably be expected to keep the VW Polo under attachment indefinitely

unless – and this is entirely unclear to me – the amount paid by Ms Kirst into her attorney's trust account in terms of Henney J's order somehow nonetheless included the value of that vehicle. In my view it would be appropriate, in these circumstances, to place a time limit on this attachment.

Evaluation

- [53] One must have sympathy for Mr Foster. It was clear from his testimony that he was convinced of the correctness of his case. I have deliberately set out the evidence on the “partnership” issue in some detail, because it demonstrates that Mr Foster has failed to discharge the onus which he bears.
- [54] While I might have suspicions about the manner in which the Kirsts conducted their affairs there is simply not enough evidence to show on a balance of probabilities that: (a) a partnership of any kind existed between Mr and Ms Kirst; and (b) to the extent that the Sykes sequestration application indicated a specific partnership or joint venture, the items attached by the Sheriff, and claimed by Ms Kirst, were acquired as a consequence of any profits made in terms thereof.
- [55] Regarding the vehicles and trailer transferred by Mr Kirst to Ms Kirst in November 2019, and again while I might have suspicions, Mr Foster's own timeline when weighed against the evidence about Ms Kirst's planned imminent departure from South Africa at the time, must tip the scales in her favour; and on the facts which she proved in relation to the onus she bore, I cannot find that they were not purchased out of her own funds, or those of her father, or a combination of the two. The same applies to the VW Combi Transporter which, apart from the Subaru, was the only other item attached by the Sheriff at [...] T[...] Avenue.
- [56] That being said, it is also clear that Ms Kirst, who is obviously intelligent and well-educated, has little difficulty at times in being economical with the truth. This much is amply demonstrated by her attempts to explain away her previous affidavits, her misleading of the Sheriff, and the circumstances of Mr

Kirst's closure of his bank account. It can also safely be said that Mr Foster cannot fairly be criticised for relying on the truth of those affidavits and other falsehoods to advance his case.

[57] I acknowledge that, as became apparent during her evidence, her motive for "looking after" Mr Kirst was to ensure the emotional wellbeing of her children, but she will nonetheless have to bear the consequences of those untruths. The most appropriate way for her to do so is to order that, notwithstanding her success in these proceedings, Mr Foster should not be ordered to pay her costs.

[58] **The following order is made:**

- 1. Save for the Volkswagen Polo vehicle registered in the name of the third claimant ("VW Polo") the execution creditor's claim to the items attached by the applicant on 23 December 2020, 15 May 2023 and 23 June 2023 respectively, is dismissed;**
- 2. The second claimant is declared the owner of the movable goods to which she has laid claim in these proceedings, and the monies held in trust as security for the execution creditor's claim in terms of the order granted on 22 February 2024 shall be released to the second claimant, subject however to the terms of paragraph 4 of that order;**
- 3. The execution creditor's claim to the VW Polo is postponed sine die subject to paragraph 4 below;**
- 4. Unless the execution creditor makes application by Friday 31 January 2025 for the appointment of a curator ad litem for the third claimant to represent her, the attachment of the VW Polo shall automatically lapse; and**
- 5. The execution creditor and the second claimant shall each pay their own costs, including any reserved costs orders.**

J I CLOETE

For execution creditor: Adv K Engers SC

Instructed by: Brian Segal Attorneys (Mr B Segal)

For second claimant: Adv D Baguley

Instructed by: Assheton-Smith Ginsberg (Mr A Ginsberg)