

SOUTH AFRICA / JUDGMENT

Augostine v Haywood N.O and Others (3635/2018) [2019] ZALMPPHC 58 (6 December 2019) [2019] ZALMPPHC 58

COURT

Limpopo High Court, Polokwane

BEFORE

E M Makgoba

CASE / FILE NUMBER

3635/2018

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO

DIVISION, POLOKWANE)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO THE JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 3635/2018

6/12/2019

In the matter between: CORNELIA ALETTA
AUGOSTINE
APPLICANT
and
MARY HAYWOOD
N.O
FIRST
RESPONDENT
RENEE BERNICE BAILEY
N.O
SECOND RESPONDENT
[In their capacities as
the joint trustees in the Insolvent Estate
of Martin Riaan
Augostine]
[Master's Reference
Number: T2702/16]
THE MASTER OF THE HIGH
COURT, PRETORIA
THIRD RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] In this matter the Applicant has launched an application in terms of the provisions of section 21(4) of the Insolvency Act 24 of 1936 ("the Act") wherein she claims the following relief in her Notice of Motion:
1. That the First and Second Respondents be ordered to release the following property to the Applicant pursuant to the provisions of Section 21 of the Insolvency Act, No. 24 of 1936:
 - 1.1. Erf 1010 Groblersdal, Extension 22, held under Deed of Title R52213/2012;
 - 1.2. Erf 47 Groblersdal, held under Deed of Title T9325/2013;
 - 1.3. The movable assets attached by the Sheriff of the High Court as listed in the inventory attachment report of the said Sheriff under T2707/16 at Groblersdal on 7 December 2016.
 2. That the Applicant be declared the rightful owner with title against all creditors of the insolvent estate of Martin Riaan Augostine of the following property:
 - 2.1. Erf 1010 Groblersdal, Extension 22, held under Deed of Title R52213/2012; and
 - 2.2. Erf 47 Groblersdal, held under Deed of Title T9325/2013.
 3. That the costs of this application be costs in the insolvent estate of the Respondent.

[2] Section 21(1) of the Insolvency Act 24 of 1936 (“the Act”) provides that upon the sequestration of the separate estate of a spouse (“the insolvent”) all the property of the other spouse (“the solvent spouse”) vests in the Master and thereafter in the trustee. The insolvent in this case is Martin Riaan Augostine whose estate was finally sequestrated on 12 December 2016 is the Applicant’s husband. The solvent spouse, to whom I shall

refer as “the Applicant” is Cornelia Aletta Augostine. Her application is based on section 21(2) of the Act, which provides that the trustee shall release any property of the solvent spouse which is proved by that spouse to have been acquired during the marriage by a title valid as against the creditors of the insolvent.

[3] In essence, the Applicant seeks an order for the release of certain immovable and movable property pursuant to the provisions of section 21 of the Act and further, for declaratory relief to the effect that the Applicant is the rightful owner with title against all creditors of the insolvent estate of Martin Riaan Augostine.

The Applicant seeks also an order for the release of movable assets attached by the Sheriff.

[4] The purpose of section 21 of the Act is to prevent or at least to hamper collusion between spouses to the detriment of creditors of the insolvent spouse, and viewed from the other angle, to ensure that property which properly belong to the insolvent ends up in the estate.

See *De Villiers NO v Delta Cables (Pty) Ltd* 1992(1) SA 9 (A) at 131; and

Harksen v Lane NO and Others [1997] ZACC 12; 1998 (1) SA 300 (CC) at 318E.

[5] The Applicant is married to Martin Riaan Augostine (“the insolvent”) out of community of property. The insolvent was previously a practicing attorney and was struck from the roll of attorneys consequent upon trust money shortages in his trust account. The insolvent was finally sequestrated on 12 December 2016 and the First and Second Respondents (“the trustees”) were appointed as the joint trustees of the insolvent estate.

[6] The trustees obtained a warrant as contemplated by the provisions of section 69(3) of the Act and compiled an inventory of the assets believed to belong to the insolvent estate. Subsequently, the Applicant presented an affidavit for the release of the assets which the trustees claimed, and alleged to be the rightful owner and rightful title holder to the immovable properties that form the subject matter of this application, as well as the movable assets situated at such immovable property. An insolvency enquiry ensued during August 2018 and the Applicant as well as the insolvent were subpoenaed to testify at the enquiry. A certified copy of the enquiry Report is attached to the Respondents’ answering affidavit.

[7] The Applicant relies on the provision of sub-sections 21(2)(c) and 21(2)(e) of the Act for the relief claimed. In order to succeed in terms of these subsections, the Applicant must prove:

7.1. that the property sought to be released have been acquired by the Applicant during the marriage with the insolvent by a title valid as against creditors of the insolvent[1] , or

7.2 that the property sought to be released have been acquired with any such property or with the income or proceeds thereof[2].

[8] The Applicant bears the onus of proving her entitlement to the release of the property and the Applicant must prove the true transaction and that it is one which may confer a valid title. In the decision of *Beddy N.O v van der Westhuizen* 1999 (3) SA 913 (SCA) the Supreme Court of Appeal held as follows:

“As far as onus is concerned s 21(2) expressly places the onus on the solvent spouse, and I do not think that the onus is discharged simply by pointing to the ostensible transaction (in this case the sale) and saying to the trustee: “it is now your turn to do your worst with it”. The onus is on the solvent spouse to prove the true transaction and that it is a valid one which as may confer a valid title. Validity usually closely related to the parties’ knowledge of the alienator’s actual or imminent insolvency[3].”

[9] I proceed to set out hereunder the version of the Applicant. To do justice to the Applicant, I reproduce verbatim the contents of paragraphs 47 to 67 of her founding affidavit.

The contents of the affidavit read as follows:

“ 47.

We jointly applied for a bond which was in time approved, consequently upon which the immovable property (our common home) was purchased

with the proceeds of the said loan. These properties that we owned from time to time constituted our family home for the time being,

where both ourselves and our children resided, and were registered either solely in my name, and previous property in the names of the insolvent and I, jointly.

48.

My monthly income throughout, was deposited into our joint private account, from which account our monthly bond installments and other private expenses were paid without exception.

49.

I have been advised that for purposes hereof, it is not necessary to deal with the financial detail of all the properties that I had owned since we were married and had sold and transferred by the date of the sequestration of my husband’s estate.

50.

I do however vividly recall that the first property that we acquired was in 1996. We occupied this property for approximately 3 ½ (THREE AND A HALF), to 4 (FOUR) years, whereafter this property too was sold.

51

The next property we purchased, approximately in the year 2000, was occupied by our family for 4 (FOUR) years. The property was again sold.

52.

In approximately 2004/5, we again purchased a property in Groblersdal and stayed there for 11 (ELEVEN) years. The property was again sold.

53.

When we sold the last house aforesaid, we acquired a stand in Welgevonden Estate. It was registered in both our names. We sold that stand and acquired Stand 1010, Groblersdal Ext 22 (also situated in the Welgevonden development), which property has always been, and still is, registered in my name only.

54.

When we acquired the property in Welgevonden, described as Stand 1010, Groblersdal, Ext 22, I applied the accumulated profit which accrued over the years, since the first property was acquired and sold, to in-part pay for the stand and improvements thereon

55.

In order to supplement the initial shortfall on the purchase price of this property I applied for a bond at Standard Bank who granted

further funding in the amount of +- R600 000.00 and was also assisted financially by my mother, Anna Elizabeth Nel, in order to erect the buildings and improvements on the property as it is today. I attach her affidavit hereto marked Annexure "CAA2" which affidavit accompanied my affidavit for release which I submitted to the First Respondent.

56.

I cannot with any measure of certainty recall the exact amount spent in respect of the building activities from memory.

57.

I do however recall appropriating the combined proceeds of the Standard Bank Loan, the advances received from my mother from time to time, the proceeds the first stand that we own jointly in Welgevonden and rental income from my other property, towards erecting the dwelling and other improvements on the stand.

58.

If necessary and possible, and if required thereto, I will provide this Honourable Court with greater detail in this regard.

59.

I attach hereto in the interim as Annexure “CAA9”, a deed search conducted in the records of the Registrar of Deeds, Limpopo, confirming my registered ownership of the immovable property, referred to above. The details of the bond registered over the property is evident from the deed search.

60.

I respectfully refer the Honourable Court to the Windeed search confirming the title particulars of the property referred to above,
as was purchased on 31 January 2012 and registered in my name on 19 July 2012.

61.

I am also the registered owner of a property known as Portion 1 of Erf 47, Groblersdal. I attach hereto as Annexure “CAA10” a copy of a Windeed search confirming that I have been the sole registered owner of this property since date of registration thereof,
being 5 September 2013.

62.

I explain the history of this property as follows:-

63.

Approximately 15 years ago, my husband, who at that stage was a practicing attorney in Groblersdal, decided that it would make sound financial sense for us to invest in a number of immovable properties.

64.

At that stage we acquired two immovable properties, being Portion 1 of Erf 47, Groblersdal referred to above, as well as another property situated at the address known as 23 Grobler Avenue, Groblersdal. The Deeds Office description and Deed of Transfer Number, is unfortunately not known to me.

65.

Portion 1 of Erf 47, Groblersdal was situated at 14 Grobler Avenue, Groblersdal.

66.

My husband thought it best to register this property in our names jointly, as a result of which we became the registered owner of an individual half-share in the aforementioned immovable property.

67.

The other property situated in Grobler Avenue, was registered solely in my name and was acquired with financial support of a financial

institution who secured the debt with a bond.”

[10] It is of particular importance to note the contents of the Applicant’s affidavit where she states “I have been advised that for purposes hereof, it is not necessary to deal with the financial detail of all the properties that I had owned since we were married and had sold and transferred by the date of the sequestration of my husband’s estate”.

This is where the Applicant, unfortunately, missed the point, for the onus is upon her to come out with evidence to prove that she is entitled to the release of the properties from the insolvent estate. Furthermore in paragraph 56 of her affidavit she states that “I cannot with any measure of certainty recall the exact amount spent in respect of the building activities from memory”. Lastly, in paragraph 58 she states that “if necessary and possible, and if required thereto, she will provide this Court with greater detail in this regard”.

With respect, I am astonished by the above statement because it is only in the founding affidavit that it was expected of the Applicant to provide those greater details.

[11] Ms Lottering, Counsel for the Respondents submitted that the founding affidavit as a whole is lacking, evasive and unpersuasive. She furthermore submitted that the Applicant’s allegations are shrouded in mystery and not at all capable of objective demonstration and proof. I agree.

The evidence presented by the Applicant in the present case warrants the same, if not more, criticism as expressed by the SCA in *Beddy N.O v van der Westhuizen*[4] where Schultz JA said:

“When the evidence is considered one is struck by the generality of much of what is presented by the wife on important matters and by the paucity and patchiness of documentary support. It was not that she was not forewarned. The trustee warned her at an early stage that her duty entailed that she had to be presented with sufficient evidence before she could release assets. In her answering affidavit the trustee raised pertinently those things that troubled her and which in her opinion required explanation. Yet in her reply the wife went so far as to say that she had already largely dealt with the real points of dispute in her founding affidavit. Although she did attempt to deal with some of the points raised in the answer, her tendency was to be dismissive and not face up to them squarely. Perhaps that was because it was not possible for her to do so.”

[12] On the basis of what she has stated in her founding affidavit the Applicant has failed to provide supporting documents to sustain the claim of ownership of the immovable property. No or insufficient evidence of actual payments for the acquisition of immovable property is provided and the scarcity of information is accordingly telling. One would expect from the Applicant to set out fully and truthfully the manner in which the immovable properties were acquired and how they were dealt with.

[13] In paragraphs 48 – 58 of the founding affidavit the Applicant deals with the properties allegedly acquired and subsequently sold by her and the insolvent prior to acquisition of Erf 1010 which is registered in her name.

In this regard one is struck by the generality thereof and the absence of details regarding purchase dates, purchase prices, method of acquisition, mortgage bond particulars and proof of payments. No documentary evidence whatsoever is appended to corroborate the general and vague assertion that the “accumulated profit accrued over the years” in respect of the other immovable

properties that had been utilised to “pay for the stand and the improvements thereon”[5].

The Applicant merely states that “greater details” would be provided to the Court “if necessary”. It is not known at what stage envisaged by the Applicant will this Court be furnished with such greater details.

[14] The scarcity of the information furnished in the founding affidavit, the generality of the statements made and the absence of details is equally striking in respect of the transactions concerning Erf 47.

I Accordingly make a finding that the Applicant has failed to present any evidence at all of entitlement to ownership and / or title to the immovable properties as contemplated by section 21(2)(c) and 21(2)(e) of the Act.

[15] On the evidence before me it is clear that in this case the insolvent husband’s money had been used to acquire the immovable properties and caused the properties to be registered in the wife’s name.

In the decision of *Kilburn v Estate Kilburn*[6] the Court found that “the money was the husband’s money and he caused the land to be registered in his wife’s name with the deliberate intention of defeating the rights of creditors. It is a well-known principle of our law that Courts of law will not be deceived by the form of a transaction: it will rend aside the veil in which the transaction is wrapped and examine its true nature and substance”.

[16] The Applicant seeks also an order for the release of movable assets attached by the Sheriff. Such attached movable assets are the household furniture and effects including household appliances found in one of the immovable properties which is the primary residence of the Applicant’s family. The question that arises is whether these movable properties should be released to the solvent spouse (Applicant) provided of course that the Applicant proved a valid title as against the creditors of the insolvent.

In this instance the Applicant must show and prove that the property was paid for with her own money.

[17] The Applicant and the insolvent were married to each other out of community of property on 10 April 1993. When the insolvent was sequestered in December 2016 the parties had been married for 23 years.

The Applicant matriculated in 1985, qualified as a teacher and obtained BA Education degree and thereafter obtained an Honours Degree.

She has been gainfully employed for the whole of her adult life. She has been earning a fixed income throughout the subsistence of her marriage to the insolvent. As a teacher, the Applicant qualified for a housing subsidy from the Department of Education and at one stage of their marriage the Applicant and the insolvent jointly owned property utilising this subsidy. The Applicant's monthly income was deposited into a joint private account from which account the monthly bond instalments and other household expenses were paid without exception.

[18] In paragraph 94 of her founding affidavit the Applicant states:

“Throughout our marriage, and irrespective of who make payment towards the household items, it was our arrangement that I would become the owner of the household furniture, equipments and the other separate household items”

Regarding her jewelry, the Applicant stated in paragraph 96 of the affidavit that throughout her marriage, she from time to time acquired jewelry, either from her husband as a gift, or by purchasing it herself with her very own means.

[19] It is against this backdrop that this Court has to determine whether the Applicant has acquired the attached movable assets by a title valid as against the Creditors of the insolvent.

[20] In the decision *Harksen v Lane N.O and Others*[7] the Constitutional Court in the majority judgment of Goldstone J said that:

“[58] Since the introduction of s 21 provision in 1926, the position of women in our society has changed radically and for a number of years s 21 of the Act has served a much wider purpose than that referred by Greenberg JP in the Maudsley case. More and more women have become economically active and contribute out of their own income or investments to the property of a common household. The consequence is that nowadays, in the case of honest spouses, who are married out of community of property, it is not infrequently a matter of complexity for the spouses themselves to determine which property in their possession belonged to each of them; or, indeed, which is held in co-ownership because both contributed to the purchase price. Having regard to the close identity of interests between many married couples, they do not always make nice calculations and keep accurate records of their respective contributions to property they acquire. If it is difficult for them to do so, then so much more difficult and complex is it for a trustee who comes as a complete stranger to the financial affairs of the spouses.

The provisions of section 21 thus assist a trustee in the important determination of which property in the possession of “spouses”

belongs to the insolvent estate, not only in cases of collusion but also in the case of honest partners to a marriage or similar close relationship. This statutory mechanism is an appropriate and effective one.”

[21] In *Janit v van den Heever and Another NNO (No1)*[8] it was held that the trustee of the insolvent estate is not without a remedy in case he is unable to enforce the provisions of section 21 of the Act. The trustee can, in an appropriate case, invoke section 26 (dispositions not made for value) section 29 (dispositions having the effect of preferring one creditor above another creditor which constitutes voidable preferences) section 30 (dispositions intended to prefer one creditor above another which constitute undue preferences) section 31 (dispositions made in collusion with another person and having the effect of prejudicing creditors or preferring one above another).

In addition, creditors have their common law right to have transactions made in fraud of their rights set aside (the *actio Pauliana*).

[22] The Applicant submits that throughout her marriage, the insolvent contributed towards the joint household expenses and she is not in a position to advise with any degree of certainty the exact amount that the two of them contributed towards the joint household. The Applicant purchased certain furniture, appliance and household effects from time to time and so too did she receive and inherit certain movable items from her parents over the years. I agree with the Applicant’s submission that no legal basis exists for the suggestion by the Respondents that parties who are married to each other cannot support each other in the running of the family affairs and also in each other’s affairs during the marriage.

[23] It is trite that once the solvent spouse has discharged the onus of showing that the property in question was not acquired by improper methods intended to prejudice the creditors, the trustee is obliged to release such property from the insolvency proceedings. That property would have been acquired by the solvent spouse through her or his resources during the marriage and such acquisition would have vested on her / him a valid title against the creditors of the insolvent spouse[9].

[24] In the unreported decision of *Meyerrowitz v Motsheka N.O and Others*[10] Nochumsohn AJ said the following at the respective paragraphs of the

judgment:

“12.4.57..... The fact that their income and/or funds were pooled does not detract from the fact that she became the owner, whether or not the insolvent also effectively contributed thereto”

“12.4.58. This is not a case where the insolvent sought to protect his own assets by transferring same to his wife. This is simply a case where a family stood together in a time of crisis. The mere fact that the insolvent also contributed to the payment of the monthly bond instalments throughout the duration of both loan accounts does not detract from the fact that it was at all material times the intention that only the applicant be the owner thereof”

In Meyerowitz the applicant and the insolvent had for a period in excess of seven years pooled their income by depositing same into one account and utilised same to discharge their monthly bond installments and other liabilities.

As the learned Judge correctly put it “It thus becomes a difficult egg to unscramble, as to who exactly paid what, as by and large, the combined income of the insolvent and her husband merged into one melting pot, for the joint discharge of their respective obligations”.

[25] In the present case the Applicant has been in the marriage with the insolvent for over twenty years. At all material times she has been employed as a teacher earning a fixed income. It can hardly be said that she sat back, without an income and was supported by her husband or that she acquired those movable assets with the funds derived from her husband.

In my view the Applicant did acquire the movable assets by a title valid as against the creditors of the insolvent spouse.

[26] In the circumstances, I make the following order:

26.1. The application for the release of the following property to the Applicant is dismissed:

1.1. Erf 1010 Groblersdal, Extension 22, held under Deed of Title

R52213/2012;

1.2. Erf 47 Groblersdal, held under Deed of Title T9325/2013.

26.2. The First and Second Respondents are ordered to release the

movable assets attached by the Sheriff of the High Court as listed in the inventory attachment report of the said Sheriff under number T2707/16 at Groblersdal on 7 December 2016 forthwith.

26.3. It is declared that the aforesaid attached movable assets have been acquired by the Applicant by a valid title as against the creditors of the insolvent estate.

26.4. Each party to pay his or her own legal costs of these proceedings.

E M MAKGOBA

JUDGE PRESIDENT OF THE HIGH COURT, LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

: 14 November 2019

Judgment

delivered on : 06 December 2019

For the Applicant

: Adv. A J Schoeman

Instructed by

: Strydom & Bredenkamp Attorneys

c/o Bosman Attorneys

For the 1st & 2nd Respondents : Adv. U Lottering

Instructed by

: J I Van Niekerk Inc

c/o Pratt Luyt & De Lange Attorneys

[1] Section 21(2)(c)

[2] Section 21(2)(e)

[3] At pages 916 – 917 See also Maudsleys Trustees v Maudsley 1940 TPD 399

[3] At pages 916 – 917

See also Maudsleys Trustees v Maudsley 1940 TPD 399

[4] 199 (3) SA 913 (SCA) at p. 918B-C. See also: Rends v Gutman NO & Others 2003 (1) SA 93 (C) at 97G, Snyman v Rheeder 1989 (4) SA 496 (T) at 505H to 506A, Coetzer v Coetzer 1975 (3) SA 931 € at 936A

[5] Founding Affidavit par 54 page 21

[6] 1931 AD 501 at 507

[7]

[1997] ZACC 12; 1998 (1) SA 300 (CC) at 326 para 58

[8] 2001

(1) SA 731 (WLD) at 736 para 16

[9] See Kilburn v Estate Kilburn 1931 AD 501 at 507 to 508

[10]

[2014] ZAGPJHC 309 (31 October 2014)

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