

SOUTH AFRICA / JUDGMENT

De Lange v Smit and Others (12987/2013) [2013] ZAGPJHC 204 (29 June 2013)

[2013] ZAGPJHC 204**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Kolbe

CASE / FILE NUMBER

12987/2013

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Source record**NOT REPORTABLE****IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG****(REPUBLIC OF SOUTH AFRICA)****CASE****NO :12987/2013****DATE:29/06/2013****In the matter between:**

DE LANGE, HESTER MAGARETHA
(formerly SMIT, born VAN DER
WALT)Applicant
and
SMIT, JOHANNES
GOTTLIEB.....Applicant
PRAKKE, A
E.....Second
Respondent
COETZEE, F W J, N.O.THE
SHERIFF, ROODEPOORT
.....Third Respondent

JUDGMENT

KOLBE AJ:

INTRODUCTION

This matter has an unfortunate history. On 7 July 2003, the Applicant caused a divorce summons to be issued against the Respondent. This summons resulted in a settlement agreement being made an order of Court on 25 May 2006 in terms of which a Mr Watkinson was appointed as a referee in terms of Section 19 bis of the Supreme Court Act 59 of 1959 to determine the value of the accrual to the respective estates in accordance with the parties' prenuptial contract. Wide powers were given to the referee quoted in full in the papers and not repeated here.

Of relevance is the terms of paragraph 5.7 which reads as follows:

"Once the referee's report has been adopted by the above Honourable Court in terms of payment by either party to the other, shall, in the absence of an agreement between the parties, be determined by the above Honourable Court."

It is not entirely clear what is meant by the terms of this paragraph but presumably that in the absence of an agreement between the parties that the report should be adopted, that the Court should based on the report make a final determination with respect to any possible payment by one party to the other.

As far as costs are concerned, the Applicant and the First Respondent agreed that that issue would stand over for argument once the referee's report has been adopted by the Court.

Further relevant to the present matter are the provisions of Section 19 bis (6) which provides for the reasonable remuneration and expenditure by the referee which should be taxed by the Taxing Master of the Court and shall be costs in the cause.

At some stage thereafter, the Applicant and First Respondent decided that Mr Warren Watkinson was too expensive which resulted in the Second Respondent, Mr Prakke, accepting the appointment.

On 26 March 2010 an application by the present Applicant for the substitution of the Second Respondent was by agreement removed from the roll and Second Respondent afforded 19 days from date of the order within which to conduct his investigation and submit a report to the Court in accordance with the order of 25 May 2006 and it was ordered that the costs of that application would be costs in the liquidation of the parties' estate.

The Applicant avers that in an attempt to enforce the initial divorce order as amended, she instructed her attorneys to take certain steps in execution against the First Respondent which resulted in a return nulla bona by the Deputy Sheriff of Roodepoort.

Armed with this return nulla bona, the Applicant on 11 October 2008 caused an application to be issued for the sequestration of the First Respondent which was

dismissed with costs on 29 April 2009.

The taxed costs of the application were not paid.

Consequently and during or about 13 August 2009, certain movable assets that belonged to the Applicant were attached and subsequently sold in execution for an amount of R1 880,00. As certain promises to pay the taxed costs were not adhered to, the Sheriff on 14 September 2010 and on instructions of the First Respondent, attached, by serving the warrant of execution on the Applicant personally, the right, title and interest as well as a claim in respect of the anticipated accrual claim she acquired in terms of the divorce order dated 15 May 2006.

This right, title and interest was on 9 December 2010 sold at public auction to the First Respondent's attorney, Mr van Rensburg, for the sum of R600,00 plus VAT.

THE PRESENT APPLICATION

The present application is for the removal of the Second Respondent and his replacement by one Mr Culhane to act as receiver and for the setting aside of the sale in execution as constituting an abuse of the Court's process.

The First Respondent's case is that the Applicant has no locus standi to apply for the removal of the Second Respondent having been divested of her right to share in the accrual in the estate of the First Respondent.

With respect to the removal of the Second Respondent, the First Respondent avers that both Mr Prakke, the Second Respondent, as well as his predecessor, were selected by the Applicant and there does not seem to be any reason why the situation would improve if anybody else is appointed.

As the Second Respondent was appointed by the Court to conduct an investigation and to report back to the Court, he was, with the consent of the parties, called to explain why he had failed to comply with the order of 26 March 2010.

His response was succinct and clear that he received no co-operation from either the Applicant or the First Respondent, that both purport not to have any assets and that he was in any event informed that Mr van Rensburg, who bought the Applicant's right, title and interest in the accrual indicated that he did not wish to pursue the matter.

THE SALE IN EXECUTION

At the commencement of the hearing, the Applicant moved on behalf of the Applicant for an amendment to the notice of motion to provide for the relief presently sought in the alternative to be sought in addition to the principal relief.

At the time I indicated that the amendment together with the point in limine would be decided with the remainder of the matter.

The Respondent contends that the Applicant has, by virtue of the sale in execution of her right, title and interest in any accrual in the estate of the First Respondent, lost her locus standi to bring an application for the removal of the Second Respondent.

The Applicant contends that the sale in execution falls to be set aside as it was mala fide and an abuse of this Court's process which should not be countenanced by the Courts and that in any event the Applicant was not divested of her interest in the costs order in the divorce and that the sale in execution did not relieve the Second Respondent from his duty notwithstanding the letter addressed by the Second Respondent's attorney dated the 10th of December 2010 which I quote in full:

"7. Writer hereby advises that he has no interest in pursuing the claim against Mr Johannes Gottlieb Smit and would appreciate you to finalise your papers in this instance.

8. Kindly may we request you to confirm receipt of this letter and only to produce the contents of this letter to Dr de Lange (previously Smit), or her attorney, on demand."

It was as a consequence of this letter that the Second Respondent failed to comply with the Court order.

I pause to mention that the Second Respondent was appointed by the Court and instructed by the Court to produce a report and it was not for a party to unilaterally decide that non-compliance is in order.

The Applicant states that she only became aware of the sale in execution after the event and was not aware thereof.

She admits, however, having been served with the warrant of attachment which she states she could not read.

Mr Sieberhagen on behalf of the Applicant referred me to a number of judgments dealing with sales in execution, the purpose of which was simply to deny a party the very existence of his claim and case law relating to abuse of a Court's process.

Even accepting, as contended by Mr Sieberhagen on behalf of the Applicant that the sole purpose of purchasing the Applicant's right, title and interest in any possible accrual in the estate of the First Respondent was for an ulterior purpose, namely not to exact payment of the costs order obtained by the First Respondent but simply to deprive the Applicant of her right, that fact in itself cannot render an otherwise lawful procedure unlawful.¹

The question now is whether the attachment and sale in execution was lawful.

The relevant portions of Rule 45(8) read as follows:

“(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached with out the necessity of a prior application to Court in the manner hereinafter provided:

where the property ...;

where ...

in the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,

the attachment shall only be complete when –

a notice of the attachment has been given in writing by the Sheriff to all interested parties and where the asset consists of incorporeal immovable property ..., and

the Sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;

the Sheriff may upon exhibiting the original of the warrant of execution to the person having possession of property in which incorporeal rights exist, enter upon the premises where such property is and make an inventory and valuation of the right attached.”

REMOVAL OF THE SECOND RESPONDENT AS REFEREE

As indicated earlier, he was briefly called to explain his failure to produce the report. This was done with the consent of the parties and because he had been appointed by the Court and instructed by the Court to produce a report.

In view of his explanation that he received no co-operation from the parties including the Applicant and was furthermore faced with an indication by both parties that they possess no assets (and the letter received from Mr van Rensburg) as the reason why he did not complete the report, there seems to be no reason to replace him with another person.

It is clear that his failure to produce a report was not due to any unwillingness on his part to finalise a report. He was in any event a person nominated by the Applicant.

This is, however, a matter that needs to come to finality and I intend to make an order to achieve this.

In the result I make the following order:

The amendment to the notice of motion to read that the alternative relief is claimed in addition to the main relief is granted.

The sale in execution on 10 December 2010 of the Applicant's right, title and interest in her accrual claim is hereby set aside.

The Applicant is ordered to pay the sum of R686,00 to Mr van Rensburg.

The Respondent's point in limine with respect to the Applicant's locus standi is dismissed.

The application for the removal of the Second Respondent, Mr Prakke, is dismissed.

The Applicant and the First Respondent are ordered to:

within 20 days of the date of this order to provide the Second Respondent with a schedule of his or her own assets, a schedule of what he/or she states the assets of the other party consisted of as at the date of divorce together with such supporting documentation as he or she wishes to attach to the schedule;

within ten (10) court days of the date referred to above, the Applicant and First Respondent shall respond in writing to the aforesaid schedules to each other and to Mr Prakke, the Second Respondent;

within twenty (20) court days from the date referred to in supra the Second Respondent is to provide both parties with his final report and file the report with this Court.

After receipt of the final report by the Second Respondent, either party may take such steps as may be required to have the issue with respect to the accrual and costs of the divorce action enrolled.

The costs of this application will be costs in the liquidation of the estates of the parties.

KOLBE AJ _____

1 See: *Brummer v Gorfil Brothers Investments (Pty) Limited and Another* 1999 (3) SA 389 (SCA) at 414 I – 414 B and 417 B

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