

SOUTH AFRICA / JUDGMENT

J.C.S v J.J.S and Others (82452/2015) [2021] ZAGPPHC 647 (16 September 2021)

[2021] ZAGPPHC 647

COURT

North Gauteng High Court, Pretoria

BEFORE

Réan Strydom

CASE / FILE NUMBER

82452/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED: YES/NO

Date:

16/8/2021

CASE NO: 82452/2015

In the matter between : J[....] C[....]
S[....]
Applicant
and
J[....] J[....]
S[....]
First Respondent
J[....] J[....] S[....]
N.O.
(in his capacity as the
Trustee of the
JJ S[....] Family
Trust)
Second Respondent
JACQUES ANTONIE
OELOFSE N.O.
Third Respondent
JJ S[....] Family Trust)
NEVILLE MATHEE
N.O.
Fourth Respondent
MASTER OF THE HIGH
COURT,
PRETORIA
Fifth Respondent
IZUCO AUTO SPARES
CC
Sixth Respondent
JUMBO REBUILDS CC
Seventh Respondent
DANCING PLACE
(PTY) LTD
Eighth Respondent
RUSTY'S PUB
AND GRILL (PTY)
LTD
Ninth Respondent
NELSPRUIT BAKKIE
SPARES (PTY) LTD
Tenth Respondent
ORG NEL MOTORS
(PTY)
LTD
Eleventh Respondent

JUDGMENT**STRYDOM J :**

- [1] This is an application for the joinder of the second, third, fourth, sixth, seventh, eighth, tenth and eleventh respondents.
- [2] Only the eleventh respondent still opposes this application to be joined as a party in the divorce action between the applicant and the first respondent.
- [3] The eleventh respondent, Org Nel Motors (Pty) Ltd, conducts a business as a second-hand motor vehicle dealer from premises, situated at 2 Silva Street, Nelspruit, Mpumalanga (“the premises”). The premises were previously rented by the sixth respondent to conduct a similar business as that of the eleventh respondent.
- [4] A dispute arose between the divorcing parties as to which legal regime would govern their marriage. It has now been found by the Full Court of this Division of the High Court that the applicant and the first respondent were married in community of property. This application for the joinder of the eleventh respondent will be considered in line with that finding.
- [5] The court was faced with two condonation applications. One on behalf of the applicant for the late filing of a replying affidavit and one on behalf of the eleventh respondent for the filing of a supplementary affidavit. The delay in filing of a replying affidavit was caused by the outstanding judgment on the issue of the marriage regime of the applicant and the first respondent. The replying affidavit was filed after this judgment and that again caused the filing of a supplementary affidavit. The respective parties did not oppose the condonation applications and the court gave an order on record during the virtual hearing in terms of which these affidavits were allowed.
- [6] In the applicant’s founding affidavit, she made averments to support her application for the joinder of the various respondents. For purposes of this application, reference should only be made to the sixth respondent, Izuco Auto Spares CC (“Izuco”). The first respondent holds a 100% members interest in Izuco. Izuco opened two second-hand car stands which were initially operated by the first respondent but later by Mr Neville Mathee in his capacity as manager. Mr Mathee is also the fourth respondent in his official capacity as one of the Trustees of the JJ S[....] Family Trust.
- [7] The evidence contained in the founding affidavit pertaining to the eleventh respondent can be summarise as follows:

7.1 The director of Org Nel Motors (Pty) Ltd, is George Michael Stephanus Nel, also known as Mr Org Nel.

7.2 Mr Org Nel was employed by the first respondent to run the car stand which was previously rented in the name of Izuco.

7.3 The registered address of the eleventh respondent is 2 Silva Street, Nelspruit, the premises from which the eleventh respondent now conducts its second hand car dealership.

7.4 On 3 June 2019, the applicant noticed that the nameboard of the car stand was changed to Org Nel Motors. Previously the signboard referred to Izuco.

7.5 It was alleged by the applicant that the sixth respondent, through the first respondent, sold the business to Mr Org Nel for the amount of R300,000 “but I was informed that the stock alone in the business is worth approximately R3,000,000 (three million rand).”

7.6 On 12 March 2019, less than two months before the name change, the first respondent caused an article to be placed in the Lowvelder newspaper, wherein the first respondent boasts that the business is expanding. At this stage Mr Org Nel was still an employee of Izuco and appeared on the photo in the newspaper.

7.7 The applicant averred that it made no sense to sell this profitable business to anybody for a price which is ten time less than its value.

7.8 Mr Jacques Nel, the son of Mr Org Nel, is also employed by the first respondent to run the other second hand car stand of Izuco.

7.9 Mrs Marie Nel, the wife of Mr Org Nel, is employed by the first respondent to assist with administration duties at one of the first respondent’s other businesses.

[8] It was argued on behalf of the applicant that the whole Nel family is dependant on the first respondent for their financial wellbeing. Although the applicant did not know who the shareholder of the eleventh respondent was, she expressed the belief that the first respondent remained the beneficial owner thereof. It was then argued that the sale of the business of Izuco was only a simulated transaction whereby the first respondent intentionally reduced and dissipated the value of the joint estate, pending the divorce action.

[9] The eleventh respondent opposed the application by filing an answering affidavit and later a supplementary affidavit, deposed to by Mr Org Nel. At the outset it was specifically denied that the eleventh respondent purchased the business of Izuco. It was alleged that the eleventh respondent merely took over the lease agreement of one of Izuco’s premises, being 2 Silva Street, Nelspruit. A lease agreement was attached to the opposing affidavit. It was stated that the eleventh respondent is conducting business from the premises as from 1 June 2019.

[10] It was further stated that the purchase price of R300,000 was only for certain assets and attachments that Izuco made to the leased premises and which it would otherwise have removed. A copy of the agreement of sale between George Michael Stephanus Nel (Mr Org Nel) and Izuco Auto Spares CC (Izucu) is attached to the papers. In terms of the signed agreement dated 28 May 2019, items such as office furniture, car ports, Wendy houses, etc were sold. It was specifically stated in this agreement that the parties placed on record that there was stock involved in the sale of the assets.

- [11] Attached to the opposing affidavit was proof of payment for the account of Izuco, dated 31 May 2019 in an amount of R300,000.
- [12] According to the certificate issued by the Companies and Intellectual Property Commission (CIPC), the eleventh respondent was registered on 30 May 2019.
- [13] It was stated in the answering affidavit that the applicant wanted to drag the eleventh respondent into litigation it had no interest in. To be joined will have a negative financial implication for the eleventh respondent.
- [14] In the replying affidavit the generalized statement is made that the first respondent colluded with all other respondents, excluding the fifth respondent, to file answering affidavits, by using separate attorneys, in an attempt to disguise the fact that he is in control of all these separate entities. The applicant stated that the reason for the joinder applications, including that of the eleventh respondent, was to ensure proper discovery in the divorce action. Also as the relief that the applicant intends to seek from the Court in her intended amendment of her counterclaim will have a direct impact on the eleventh respondent.
- [15] Attached to the replying affidavit was a preliminary report by a forensic investigator who was mandated to determine the value and extent of the joint estate. The allegation is made that upon a consideration of this report, the suspicion that the first respondent is busy diminishing the value of the joint estate serves to be true.
- [16] The applicant argued that it would not be competent for the applicant to issue a separate action against the eleventh respondent as substantially the same question of law and/or fact would arise in the divorce action. The fact that the eleventh respondent may have a defence, which it can raise against the applicant's claim, is not a bar to the joinder of the eleventh respondent to the action. Further, it was argued that the eleventh respondent should be joined as it will be a relevant party as it will form part of the applicant's claim in any division of the joint estate of the applicant and the first respondent.
- [17] The applicant's allegation that the agreement between Mr Org Nel and Izuco was a simulated transaction caused the eleventh respondent to file a supplementary affidavit.
- [18] Mr Org Nel who deposed to the affidavit on behalf of the eleventh respondent indicated that eleventh respondent has no interest in the divorce between the applicant and the first respondent and he denied that he has concocted or colluded with any party to defraud the applicant of any assets in their joint estate. It was pointed out that the applicant's allegations are based

on conjecture and/or hearsay evidence. Mr Org Nel then proceeded to set out in some detail how he wanted to start his own

business and agreed with Izuco to enter into a new lease with the landlord and to proceed with his own business in the name of the eleventh respondent from these premises. For that reason, he bought certain movable items from Izuco in terms of a legitimate

commercial arms-length transaction with no hidden agenda or attempt to dissipate the assets claimable by the applicant. He obtained finance to start his business from his wife and provided proof of payment. He also attached to his affidavit proof of payment of the rental for the premises to the landlord. It was specifically denied that he bought any stock from Izuco. It was pointed out that as far as the vehicles which were previously on the premises are concerned, that none of these vehicles belong to the eleventh respondent according to eNatis ownership records. This is supported by the applicant's own forensic investigation report.

- [19] It was further denied that these vehicles were kept on consignment to somehow attempt to hide the assets from the applicant in their divorce matter. When the eleventh respondent started his business, there were five vehicles belonging to either the sixth or seventh respondent on his floor. As far as these vehicles were concerned, the agreement was that the eleventh respondent would earn a storage (sales) commission when these vehicles were sold. Upon the selling of these vehicles an invoice would be generated for the storage / commission and to this extent, the eleventh respondent annexed such invoices to the affidavit.
- [20] The facts of this matter are not disputed except for the allegations of the applicant that the business of Izuco was sold, whilst the eleventh respondent stated that only a few items were sold for R300 000, and that eleventh respondent colluded with other respondents to hide the assets of the joint estate. Further it was disputed that the sales agreement was simulated and that the first respondent, through Izuco, remained the beneficial owner of the shares of the business. It was specifically denied that Izuco sold the stock to the eleventh respondent.
- [21] The applicant argued that the court should look at the bigger picture to conclude that the sale agreement was a hoax to dissipate assets of the joint estate. For this argument applicant relied extensively on her allegation that a R3 million business was sold for R300 000; that the business was sold during divorce proceedings; that shortly before the sale first respondent and Izuco boasted in the press about the strength of their business; that despite this Izuco sold the business which was successfully run with many cars for sale; that other businesses were sold to friends and employees of first respondent and that Mr Org Nel and his family are controlled by first respondent as their employer. Apart from inferences drawn by the applicant she had no direct

evidence of collusion and to a large extent relied upon conjecture and speculation to conclude that the sales agreement is a simulated

transaction. The eleventh respondent provided direct evidence, supported by documents to show what the transaction entailed.

- [22] At the outset it should be mentioned that in my view, the applicant has failed to show on the papers that the business of the sixth respondent was sold for R300 000 to the eleventh respondent. Much can also not be read into the fact that the first and six respondents decided not to continue with the business of the sixth respondent at the premises situated at 2 Silva Street, Nelspruit. The lease of the sixth respondent came to an end and this underpinned the decision.
- [23] The question remains however, whether the applicant has provided an evidential basis strong enough for the eleventh respondent to be joined in the divorce action in which the applicant wants to establish the value of the joint estate and move for a division of such estate. To consider this issue the court will have to rely on circumstantial evidence with reference to the undisputed facts together with the facts as presented by the eleventh respondent.
- [24] Despite the applicant being informed by the eleventh respondent in its answering affidavit that the sales agreement was an agreement between Mr Org Nel personally and Izuco, she persisted to have the eleventh respondent joined as the eleventh respondent is now the party running a business from the premises previously rented and occupied by Izuco.

Legal position

- [25] The test in a joinder application is whether or not the party has a “direct and substantial interest” in the subject matter of the action, i.e. a legal interest in the subject matter of litigation, which may be affected prejudicially by the judgment of the court.[1] If such interest is shown this will amount to a joinder out of necessity.
- [26] A party should be joined if an order of the court cannot be sustained or carried into effect without prejudicing that party, unless the court is satisfied that the party has waived its right to be joined.[2] The nature of the relief sought against a party was therefore relevant to the question whether the party concerned had a direct and substantial interest in the matter.[3]
- [27] Apart from a joinder out of necessity a court can join a party under the common law on grounds of convenience, equity, the saving of costs and the avoidance of multiplicity of actions. The court has the inherent power to order the joinder of further parties in an action which has already begun in order to ensure that that person’s interest in the subject matter of the dispute and whose rights may be affected by the judgment are before court.[4]
- [28] In my view, if a party does not want to be joined, as in the case of eleventh respondent, such party waived its right to be joined. Any subsequent order can be made even if the interest of such unwilling party is affected. In this case the applicant wants to join the eleventh respondent whilst the latter does not want to be joined. It was argued that apart from the direct and substantial interest the eleventh respondent has in the litigation it was convenient for the applicant to join eleventh respondent to avoid a multiplicity of actions.

Evaluation

- [29] What the applicant avers is that the eleventh respondent, through Mr Org Nel, colluded with the first respondent and Izuco to enter into an agreement in terms of which the assets belonging to the joint estate was dissipated. On the pleadings in the divorce action such averments are not made but the court was urged to allow the joinder as the applicant will still seek an amendment of her counterclaim. The court was asked to consider the joinder on the allegations made in the application.
- [30] It is common cause that the assets of the sixth respondent do not belong to the first respondent. The first respondent is the shareholder in the sixth respondent, which would mean that if assets of the sixth respondent is dissipated, it would affect the value of the first respondent's shares in Izuco. What the applicant in fact alleges is that the first respondent was busy diminishing the value of his shareholding in Izuco.
- [31] Counsel acting on behalf of the applicant conceded before this court that the evidence against the eleventh respondent which points to collusion is not direct but based on inference. It was argued that the court must order a joinder which would make it possible for applicant to demand discovery from the eleventh respondent through which process the applicant can ascertain the true intention of the parties to the sale agreement and also to ascertain as to what happened to the assets of the business. The true motive for the joinder is thus to take a shotgun approach to see if there may be a hit. That would not be sufficient to justify a joinder as the only convenience then considered would be that of the applicant. For a party to be joined in divorce proceedings of third parties will certainly cause expense and inconvenience. Moreover, the allegation was made that first respondent caused sixth respondent to get rid of assets. These parties will be before court and should answer the allegations of dissipation. The sixth respondent will have to explain what happened to the assets of its business. As stated the allegations of collusion between eleventh respondent and first respondent is unsubstantiated.
- [32] To be successful in this application the applicant had to establish on a balance of probabilities that the eleventh respondent has a direct and substantial interest in the divorce proceedings. The direct and substantial interest as far as the eleventh respondent is concerned would be that a trial court may decide that eleventh respondent acted in cahoots with first respondent to hide assets of the first respondent. To achieve this, the applicant will have to prove that the eleventh respondent, through Mr Org Nel, entered into a simulated agreement with Izuco to transfer its business to eleventh respondent.
- [33] But this is in my mind where the problems for applicant starts. The applicant has been provided with the agreement in terms of which Mr Org Nel, in his personal capacity, bought certain assets from Izuco. It was not the eleventh respondent which bought the assets and the business was not sold. All the parties to the alleged simulated agreement will not be before the court as Mr Org Nel is not joined. A trial court will not be in a position to set aside the alleged simulated agreement.

[34] Despite this the applicant asked this court to look at the bigger picture which included to consider the timing of the transaction during a contested divorce; to consider that a business allegedly worth R3 million was sold for R300,000 to people close to first respondent; to consider the other transactions between the first respondent and the other respondents and then to conclude that the first respondent was busy with a process of dissipating his assets to the prejudice of the applicant. These factors in itself

would not be sufficient. The court must at least be satisfied that a trial court may come to a finding that between the first, sixth and eleventh respondent there is prima facie evidence of collusion to hide or dissipate assets belonging to the joint estate. This finding cannot be made on the evidence before this court. Applicant's own forensic investigator could not come to such

conclusion.

[35] The applicant failed to provide any direct evidence to support her contention that the eleventh respondent was a party to an alleged fraudulent scheme aimed to defraud her in a divorce action by colluding with the first respondent to enter into a simulated sales agreement.

[36] Although it is not expected of this court to make a finding whether the business of sixth respondent was sold to the eleventh respondent the court cannot leave out of the equation the evidence provided by the eleventh respondent explaining these transactions and supporting the allegations with documentary evidence.

[37] On the papers before me it was shown that Mr Org Nel and Izuco entered into a commercial sale agreement for certain listed fixtures and assets to be sold. There is no credible evidence, apart from conjecture and speculation, to show that this was not a genuine transaction.

[38] The evidence upon which the applicant wants to rely to create the atmosphere of a simulated agreement structured between the Izuco and the eleventh respondent with the assistance of the first respondent is lacking.

[39] The legal principles regarding applications for a joinder were confirmed by Nkabinde J in a dissenting judgment in *National Union of Metal Workers of South Africa v Intervolve (Pty) Ltd and others*[5] as follows:

"The test at common law is governed by the following principles:

(a) there must be a legal interest in the proceedings and not merely a financial interest.

(b) a party has a right to ask that someone be joined as a party ‘if such a person has a joint propriety interest with one or either of the existing parties to the proceedings or has a direct and substantial interest in the court’s order’ and ‘to avoid a multiplicity of actions and a waste of costs’.”

[40] The applicant’s is wrong in her belief that the value of the joint estate is amongst others reflected in the value of the assets held by a business entity belonging to or controlled by a spouse. The diminished value, if assets were sold for less its worth, lies in the lower value of a members interest. The assets of the sixth respondent never belonged to the joint estate.

The member’s interest of the first respondent belongs to the joint estate. There is no evidence to support an allegation of dissipation of first respondent’s members interest, or the value thereof, following the sale of the assets listed in the sale agreement entered with Mr Org Nel.

[41] Applying the legal principles pertaining to joinder to the facts, the applicant has not demonstrated how the eleventh respondent, who is not a party to the alleged simulated agreement, has or may have a direct, substantial or legal interest in any order that a divorce court may make or if such order cannot be carried into effect without affecting or prejudicing it. The eleventh respondent is therefore not a necessary party and there is no basis upon which it can be joined in the divorce trial proceedings.

[42] As far as costs are concerned both parties asked for punitive cost orders. The court is of the view that such a cost order should not be made.

[43] Consequently, the applicant has failed to make out a case for the joinder of the eleventh respondent. The following order is made:

43.1 The applications for condonation for the late filing of a replying affidavit by the applicant and for the filing of a supplementary affidavit by the eleventh respondent are granted.

43.2 The second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondent are joined in the divorce action between applicant and first respondent.

43.3 The second, third, fourth, sixth, seventh, eighth, ninth and tenth respondent are ordered to pay the wasted costs of this application to date of their withdrawal of their opposition to be joined, jointly and severally.

43.4 The application for the joinder of the eleventh respondent is dismissed with costs.

RÉAN STRYDOM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

PRETORIA

Date of Hearing: 01 September 2021

Date of Judgment: 16 September 2021

Appearances:

For the Applicant: Adv. R. Ferreira

Instructed by: Eunanda Fourie Incorporated

For the 11th Respondent: Mr W. P Meintjies

Instructed by:

Mr W. P Meintjies

[1] See Old Mutual Life Assurance Co SS Ltd v Swemmer 2004 (5) SA 373 (SCA) at 381 C-D; Transvaal Agricultural Union v Minister of Agricultural and Land Affairs 2005

(4) SA 212 (SCA) at 226F – 227F.

[2] See Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A) at 659.

[3] See Gordon v Department of Health Kwazulu-Natal [2008] ZASCA 99; 2008 (6) SA 522 (SCA) para [9] and [11] at 529C and 530F

[4] Ploughman NO v Pauw 2006 (SA) 334 (C) at 341 E-F.

[5]

(2015) 36 ILJ 363 (CC) at para 186.

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