

SOUTH AFRICA / JUDGMENT

N-A.K v T.P.K and Others (2503/2020) [2024] ZAWCHC 297 (25 September 2024)

[2024] ZAWCHC 297

COURT

Western Cape High Court, Cape Town

BEFORE

P Andrews

CASE / FILE NUMBER

2503/2020

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION,

CAPE TOWN

Case No.: 2503/2020

In the matter between:

N[...]-A[...] K[...]

Applicant

and

T[...] P[...] K[...]

First Respondent

P[...] D[...] K[...]

Second Respondent

In his capacity as trustee in the

MASARD FAMILY TRUST

Registration Number: IT574/2010

K[...] J[...] K[...]

Third Respondent

In re:

T[...] P[...] K[...]

Respondent

JUDGMENT-

ANDREWS, AJ

Introduction

- [1] This is an application for the joinder of the Second and Third Respondents (hereinafter referred to as “the Respondents” or “trustees” interchangeably), in their capacity as trustees of the Masard Family Trust (“the Trust”) in their official capacities as parties to the ongoing divorce action instituted by the Applicant against the First Respondent. The First Respondent has elected not to oppose the application and has filed a notice to abide by the decision of the Court. The Respondents oppose the application.
- [2] The Applicant and the First Respondent are married out of community of property with the application of the accrual system. The Applicant instituted divorce action after discovering the First Respondent’s infidelity on 3 November 2017. The Applicant averred that the First Respondent has attempted to deprive her of her share in the accrual by resigning as a director of the company known as Harley Beauty Wax UK Ltd of which he was a 50% shareholder, and thus causing his shares to be transferred to the Trust. Furthermore, the Applicant challenges the assertion that the First Respondent had a loan with the Trust in the amount of R800 000, which impacts the free residue of the estate for the purposes of the accrual calculation. The Applicant is desirous to join the Trust and thereafter apply in terms of Rule 28 to include relief for the transfer of shares back into the name of the First Respondent and cancellation of the bond.
- [3] The Respondents are the trustees of the Masard Family Trust and the parents of the First Respondent. The Respondents averred that the Trust contributed towards the purchase of the parties’ immovable property situated 3[...] A[...] Street, Vermont (the “property”) as well as the renovations in the amount of about R800 000. This amount was agreed to be a loan by the First Respondent owing to the Trust. The First Respondent resigned from the company 2 years prior to the institution of the divorce action. The Respondents deny that the shares were transferred to the Trust, but asserted that it reverted to the company.

Preliminary

Issues

- [4] A further affidavit was filed by the Second Respondent after the Applicant filed her Replying Affidavit, without leave being requested to do so. At the commencement of the hearing, Counsel on behalf of the Applicant submitted that it was opportunistic for the Respondents to file a further affidavit, which did not advance the Respondent's case. The Respondents contended that the further affidavit was necessary to defend accusations of perjury, unethical and deceitful conduct which it viewed as the Applicant having introduced new material in the form of various annexures.
- [5] It is apposite to mention that the court did not condone the irregularity, however, as there was no strong opposition thereto the matter proceeded.

Applicant's Principal Submissions

- [6] The Applicant contended that the First Respondent was a director and 50% shareholder in the company known as Harley Beauty Wax UK Ltd (the "company"). On 4 January 2018, the First Respondent resigned as a director of the company. On 6 January 2018, the First Respondent caused his shares to be transferred to the Trust. The property, was subject to a bond which was held by ABSA and registered to the value of R1 100 000. A valuation of the property was done by Seef on the instruction of the First Respondent, in terms of which the value of the property was placed at R2 600 000 on 25 January 2019. The First Respondent caused a further bond to be registered over the property for R1 529 386 during the cause of August 2020, without the knowledge of the Applicant.
- [7] The effect of registering the further bond, resulted in there being no free surplus. The Applicant would have been entitled to 50% of the accrual, which prior to the registration of the further bond would have entitled the Applicant to R800 000 of the free surplus of R1 600 000. However, because of the assertion that the First Respondent had a loan with the Trust in the amount of R800 000, which the Applicant disputed, the Applicant's portion of the accrual would have amounted to R400 000.
- [8] The Applicant submitted that the alleged proceeds were not due to a loan, but emanated from monies left to the First Respondent by his grandfather in the amount of approximately 50 000 British pounds. The First Respondent is not a trustee but a beneficiary of the Masard Family Trust.

Second and Third Respondent's Principal Submissions

- [9] The Second Respondent explained that the Trust is a family trust which was initially created during 2010 for the benefit of the Second and Third Respondent's children. On 3 July 2012, shortly before the Applicant and First Respondent were married, the First Respondent purchased the property for R1 150 000, which property was registered on 10 October 2012. The purchase price of the property and transfer costs were partially funded by way of a loan from the Trust in the sum of R624 111,56. By virtue of the parties' marriage being out of community of property with the inclusion of the accrual system, the consent of the

Applicant to register the bond was not required.

- [10] The house on the property needed refurbishment which was financed by the Trust in a further sum of more than R800 000, but it was agreed that the amount of the loan would be stated as R800 000. The Respondents contended that it was at all times the intention of the trustees to lend the money and not to donate the money to the First Respondent as it would have the effect of preferring one beneficiary above the other.
- [11] It was further explained that the Second and Third Respondents have been involved in the beauty industry for approximately 40 years. When Harley Beauty Wax UK Ltd was incorporated in September 2012, it was suggested that the First Respondent, who was resident in the UK at the time, act as one of the directors and shareholders. In addition, it was contended that the First Respondent never received any remuneration during this time and the company did not declare a dividend. The First Respondent contributed no capital to the company and neither did he pay for his share. The further affidavit essentially provided an overview of the different entities which uses the name “Harley” as part of its trading name, namely Harley Beauty Wax UK Ltd, Harley Beauty Wax SA CC and Harley Body Wrap UK Ltd.
- [12] It was furthermore contended that the situation had changed 5 years later in 2017 because the First Respondent was living in South Africa and could not really contribute to building the business of the company. The company, was operating at a loss. These factors, informed the First Respondent’s decision to resign as a director and shareholder during December 2017. Upon his resignation, his shares were not transferred to the Trust, but reverted to the company. These events preceded the divorce action.
- [13] Furthermore, the Respondents submitted that even if the bond in favour of the Trust is cancelled, this would only have the effect of taking away the Trust’s security for the loan, whilst the underlying debt previously secured by the bond would remain intact. They submitted that cancelling the bond would have no effect of the accrual calculation.
- [14] The Respondents contended that the relief sought by the Applicant is bad in law as the Applicant has failed to clearly state the grounds upon which she seeks the joinder of the trustees. In addition, the Respondents averred that the Applicant has not set out a legal basis to compel the retransfer of his share to the First Respondent. Furthermore, the Respondents contended that the Applicant failed to set out in what way the rights of the Trust may be affected by the Order she will seek at the trial.

Legal Framework

[15] Rule 10(3) of the Uniform Rules of Court provides that '[s]everal defendants may be sued in one action either jointly, jointly and severally, separately or in the alternative, whenever the question arising between them or any of them and the plaintiff or any of the plaintiffs depends upon the determination of substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action.'

[16] An Applicant is required to show a direct and substantial interest in the subject matter of the proceedings. The Constitutional Court in *Snyders and Others v de Jager*[1] affirmed the entrenched test for joinder that:

'The Court confirmed that the test for joinder is that a litigant must have a direct and substantial legal interest that may be affected

prejudicially by the judgment of the Court in the proceedings concerned.' [2]

Discussion

[17] The Respondents correctly identified the court's approach in an application for joinder. In this regard, the Court does not consider the correctness of the facts on which the Applicant relies as a basis for joinder, but he or she must raise facts which

are necessary in order to constitute the relief the Applicant will be asking against the party to be joined and the way in which the rights of that party will be affected by the Order sought.

[18] The Applicant argued that the various reasons proffered by the Second Respondent for the bonds being registered and the transfer of the shares are irrelevant for the purposes of the joinder application. The Court was referred to *RP v DP* [3] where the Applicant made the averment that the Respondent was using a trust as a vehicle to accumulate personal wealth. The Court held that:

'it is unnecessary for purposes of this application to make any factual findings in this regard – this is the function of the trial court and the less said the better.'

[19] The Respondents however argued that the matter in casu is distinguishable on the merits. Furthermore, the procedure followed in *RP v DP* was that the party who sought the joinder of a Trust to divorce proceedings would prepare a draft notice of amendment of their

pleadings where the relief sought against the Trust is set out, which was not done in this matter. It was argued that the relief that the Applicant seeks against the Second and Third Respondents are unclear.

[20] Whilst the Respondents correctly identified the hurdles to overcome, it misidentified when the hurdle will be overcome as the court is not called upon to make any factual findings. The merits of the joinder and the merits of the relief sought at trial, must be

kept separately.

Conclusion

- [21] It is trite that the test for joinder is whether the party to be joined has a direct and substantial legal interest in the order the court might make. In this regard, the interest will be direct or substantial if such order cannot be sustained or brought into effect without prejudicing the interests of the party. It is incumbent on the Applicant to show that there is a right adversely affected or likely to be affected by the order sought. It is sufficient for the Applicant to make allegations which, if proved would entitle it to the relief.[4]
- [22] This court must be satisfied that the relief being sought against the Second and Third Respondents is competent relief. The Applicant indicated that the intention of setting aside the bond registered in favour of the Trust and directing that the Trust transfer the shares back into the name of the First Respondent pertain to a substantial interest and therefore warrant the joinder. The question to be answered is whether the Applicant has raised facts which are necessary in order to constitute the relief that Applicant will be asking against the party to be joined and set out the way in which the rights of that party will be affected by the Order sought.
- [23] To my mind, the Applicant's assertion that the First Respondent is attempting to move his estate into the Trust, together with the following common cause facts, are sufficient grounds to warrant the joinder of the Second and Third Respondents:
- (a) that the property became subject to a bond that was registered to the extent of the free residue and that such bond was registered in favour of the Masard Family Trust, of which the First Respondent is a beneficiary and
 - (b) That the First Respondent after having found to have committed adultery resigned as a Director of one of the entities and purportedly disposed of his share onto the Trust.
- [24] It is trite that the Applicant does not have to prove the correctness of these facts at this stage as this is the hurdle that the Applicant will have to overcome at the trial. The matter of BC v CC[5] crystallised the test and the ultimate finding of this court where Dambuza J stated –
- ‘[i]n my view, if the plaintiff's allegations are proved to be correct, the plaintiff will have succeeded in proving that the assets ostensibly owned by the trust, or some of them, are de facto the property of the first defendant, and that their value ought to be taken into account in determining the extent of accrual of the estate of the first defendant.’
- [25] This approach has been supported by a plethora of case law that affirms the approach of our courts that the Applicant's allegations are presumed to be correct for purpose of joinder, which principle has been applied in the context of divorce proceedings. In any event, the Second and Third Respondents are not without a remedy. It will remain open to them to raise an exception if no cause of action is made out against them and/or if the relief sought cannot be supported by any reasonable interpretation of the amended Particulars of Claim. I am therefore satisfied that there has been substantial compliance with the requirements for joinder as envisaged in Rule 10 (3).

Costs

[26] It is an accepted legal principle that costs ordinarily follow the result. The Applicant initially sought costs in the event of opposition and pursues such an order. However, in light of the fact that there are many unanswered questions pertaining to the disputed loan and the First Respondent's shares, which are all aspects that will be fully ventilated in the fulness of time at a hearing in due course, a costs order will be premature. This court has made no factual findings and the amendment to the particulars of claim will require consideration in due course. In my view, the trial court will be better placed to determine whether the application for joinder was ultimately meritorious against the Second and Third Respondents.

Order

[27] In the result, the following order is granted:

1. The Second and Third Respondents are joined in the divorce action instituted by the Applicant against the First Respondent under case number 2503/2020.
2. The matter of costs stands over for later determination.

P ANDREWS, AJ

Acting Judge of the High Court

Western Cape Division

APPEARANCES

For the Applicant:

Advocate L van der Westhuizen

Instructed by:

Jukes Malekjee and Associates

For the First Respondent:

No Appearance (Notice to abide filed)

For the Second and Third Respondents: Advocate G C Le Roux

Instructed by:

Guthrie & Theron Incorporated

Date of Hearing: 12 September 2024

Date of Judgment: 25 September 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.

- [1] (CCT186/15)[2016] ZACC 54 at para 6.
- [2] See also *Klaase v van der Merwe* N.O. [2016] ZACC 17; 2016 (9) BCLR 1187 (CC).
- [3] 2014
- (6) SA 243 (ECP)
- [4] *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017
- (5) SA 1 (CC) at para 9.
- [5] *BC v CC and Others* 2012 (5) SA 562 (ECP) para 18
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