

SOUTH AFRICA / JUDGMENT

Protech Readymix (Pty) Ltd v Viljoen and Another (160/2012) [2014] ZANWHC 67 (19 June 2014) [2014] ZANWHC 67

COURT

North West High Court, Mafikeng

BEFORE

A A Landman

CASE / FILE NUMBER

160/2012

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IN

THE HIGH COURT OF SOUTH AFRICA

(NORTH

WEST DIVISION, MAHIKENG)

CASE

NO.: 160/2012

In

the matter between:

PROTECH
READYMIX (PTY) LTD
APPLICANT
and
MARIUS
JACQUES VILJOEN
1ST
RESPONDENT
VICTOR
BERNARD ALLEN
2ND
RESPONDENT

JUDGMENT

LANDMAN J:

Introduction

- [1] The applicant, Protech Readymix (Pty) Ltd, seeks an order authorizing it to instruct the sheriff to attach erf 3387 Summerstrand Township, Eastern Cape Province, which is registered in the name of Victor Bernard Allen, the second respondent, in terms of deed of transfer number T85388\2004 and costs. No relief is sought against Marius Viljoen, the first respondent.

The

facts

- [2] On 31 March 2010 the applicant and the respondents entered into a deed of suretyship. Later, on 19 July 2012, the applicant obtained judgment against the respondents for the payment of R743 197.10 plus interest and costs.
- [3] On 9 March 2013 the applicant sought to execute a warrant in respect of the judgment debt. However, the sheriff returned a return of nulla bona. Significantly, the sheriff also attached a copy of what he described as an ANC (antenuptial contract) to the return of service.
- [4] The so-called antenuptial contract is in fact a post nuptial contract duly notarized that was authorized in terms of an order of the Gauteng North High Court on 21 August 2009. It appears the second respondent and his spouse applied for a permission to vary their marital proprietary regime by executing and registering a notarial contract with the registrar of deeds. See section 21 of the Marital Property Act 88 of 1984. The order provides further that the order will lapse if the deed is not submitted within three months of the date of the order. The order also protects the rights of creditors as at the date of registration of the deed. The deed provides that the property in question is an asset which has been granted to Helena Louisa Allen (Mrs Allen).
- [5] The nulla bona return led to the present application for authorization to attach the property in question.
- [6] The second respondent opposed the application and appointed an attorney. His attorney withdrew on 6 December 2013.
- [7] On 27 February 2014 Gutta J postponed this application for service of the set down on the second respondent. This was done and subsequently an opposing affidavit was filed by the second respondent to which the applicant replied.

[8] The second respondent confirms that he is married to H[...] L[...] A[...] (Mrs A[...]) out of community of property. Initially they were married in community of property, but were permitted by the

court mentioned earlier, to alter their marital property regime. In consequence of the order the second respondent and his spouse

registered a notarial deed that awarded the property in question to his spouse. He submits that the property in question cannot be sold and execution for any alleged amounts due by him to the applicant because the property in question is owned by his spouse and she is not liable for his debts.

[9] The second respondent also indicates that he intends to apply for the rescission of the judgment but that that is not relevant to the current proceedings.

Joinder

[10] Mrs A[...] has not been joined in these proceedings. Mr Wessels, who appeared for the applicant, submitted that the duty of joining her rested upon her husband, the second respondent. Mr Van der Merwe, who appeared for the second respondent, countered that the duty to join her rested on the applicant. The sheriff's return of service gave notice to the applicant that the second respondent's spouse had a legal interest in this application. In my view, the obligation to join her rested upon the applicant.

[11] However, a crisp question of law is involved and should I decide it in favour of the second respondent it will be unnecessary to join his spouse.

Ownership of the property

[12] I turn to consider whether the property in question is owned by the second respondent or his spouse.

[13] Mr Wessels suggested that the High Court for North Gauteng may not have had jurisdiction to entertain an application by the second respondent and his spouse to vary their property regime. There is no evidence that that court was not a competent court to grant the application.

[14] Section 21 of the Matrimonial Property Act of 1988 provides that:

‘(1) A husband and wife, whether married before or after the commencement of this Act, may jointly apply to a court for leave to change the matrimonial property system, including the marital power, which applies to their marriage, and the court may, if satisfied that—

- (a) there are sound reasons for the proposed change;
- (b) sufficient notice of the proposed change has been given to all the creditors of the spouses; and

(c) no other person will be prejudiced by the proposed change,

order that such matrimonial property system shall no longer apply to their marriage and authorize them to enter into a notarial contract by which their future matrimonial property system is regulated on such conditions as the court may think fit.'

[15] Mr Wessels submitted that the effect of the order enabling a division of the joint estate as embodied in the deed, is to confer a personal right on Mrs A[...] to claim transfer of the property from the second respondent. There is some authority to be found for this proposition in *Marathon Earthmovers CC v Dos Santos and Another* (unreported judgment by Willis J, as he then was, in case no 20546/2005, HCGJ) which found that the full bench decision in *Corporate Liquidators (Pty) Ltd and Another v Wiggil and Others* 2007

(2) SA 520 (T) was wrongly decided.

[16] The Wiggil judgment rested on a decision by King J in *Ex parte Menzies et uxor* 1993 (3) SA 799 (C). The gist of the Menzies judgment, for present purposes was summarized by Hartzenberg J in Wiggil at para 12 as follows:

'In the Menzies matter supra at 815A the learned judge points out that when community of property is dissolved by divorce the laws of succession do not apply. With reference to Joubert (ed): *The Law of South Africa* Vol. 16 par 119; Hahlo (op cit at 175 n 108) quoting a dictum of Fannin J in *Meyer v Thompson* N.O. 1971

(3) SA 376 at 377F he discusses the effect of an order of divorce on the proprietary interests of the spouses and then states:

"The implication of the above statement by Hahlo is that, upon the dissolution of the community by divorce, the ex-spouses become in effect free co-owners entitled to a division of the estate. Their shares become divisible. Given the circumstances of divorce, it would rarely arise in practice that they would elect to continue in co-ownership in this new form, and thus possibly the rule has grown up that the granting of divorce carries with it an automatic order for division. It is open to the divorcing spouses (see s 7(1) of the Divorce Act, 70 of 1979) to arrive at a settlement in terms of which they could, for example, continue as co-owners of particular assets. P. 815G"

[17] Hartzenberg J applied this dictum in regard to a division brought about by divorce (which is couched in similar terms to section 21 of the Marital Property Act of 1984) at paras 14, 15 and 16 which reads:

"[14] It is now necessary to have a closer look at s. 7 (1) of the Divorce Act and the effect thereof on the proprietary interest of the spouses. It reads as follows:

"A court granting a decree of divorce may in accordance with a written agreement between the parties make an order with regard to the division of the assets of the parties or the payment of maintenance by the one party to the other"

[15] “A court ...may make an order with regard to the division of the assets of the parties...” It clearly means that if the parties enter into a settlement agreement in respect of their assets and the court makes it an order of court that the division of the joint estate will be regulated by the settlement agreement and the parties will be bound by it. If the wife gets the lounge suite and the husband gets the personal computer, the effect of the order will be that the wife immediately becomes the owner of the lounge suite even if it is still in the possession of the husband. A formal delivery of his half share to the wife is unnecessary. It is also unnecessary to arrange that she be in possession of the lounge suite before she obtains dominium in it. The same holds good for the husband in respect of the personal computer. (It is accepted for the purposes of this judgment that there are no creditors with claims in respect of the lounge suite or the personal computer and that the two items were the property of the parties)[16] If, instead of a personal computer and a lounge suite, the parties own two fixed properties, A and B. The parties agree that the husband gets A and the wife gets B. The court makes the agreement an order of court. The effect of the order is that the joint estate is immediately divided in terms of the order. I cannot think of any conceivable reason why dominium in A does not vest in the husband immediately and dominium in B in the wife. It is in any event in accordance with the common law as expounded in *Rosenberg v Dry’s Executors and Others* supra. Registration of transfer of the properties to the different spouses is not a requisite for dominium to vest in them. Our system of deeds registration is a negative one where the deeds registry does not necessarily reflect the true state of affairs *Cape Explosive Works Ltd v Denel Pty Ltd* 2001

(3) SA 569 (SCA) at 579 (par.16).”

[18] King J conducted a thorough analysis of the effect of an order for division of a joint estate by order of court as did Hartzenberg J who wrote the judgment for the court in the *Wiggil* matter. See also *Keyser v Keyser* 1979 (4) SA 12 (T) at 15F and *Maharaja v Maharaj* 2002 (2) SA 648 at 649 I. I have no doubt that these decisions correctly reflects the law and that I should follow them. I should add that section 45bis(1) of the Deeds Registries Act 47 of 1937 recognizes this result and provides for publication of the effect of the automatic division by means of a suitable endorsement, on application by a spouse. This section reads:

“(1) If immovable property or a lease under any law relating to land settlement or a bond is registered in a deeds registry and it—

(a)

formed an asset in a joint estate of spouses who have been divorced, and one of them has lawfully acquired the share of his or her former spouse in the property, lease or bond; or

(b)

forms or formed an asset in a joint estate, and a court has made an order, or has made an order and given an authorization, under section 20 or 21 (1) of the Matrimonial Property Act, 1984 (Act No. 88 of 1984), or under section 7 of the Recognition of Customary Marriages Act, 1998, as the case may be, in terms of which the property, lease or bond is awarded to one of the spouses,

the registrar may, on written application by the spouse concerned and accompanied by such documents as the registrar deems necessary, endorse on the title deeds of the property or on the lease or the bond that such spouse is entitled to deal with such property, lease or bond, and thereupon such spouse shall be entitled to deal therewith as if he or she had taken formal transfer or cession into his or her name of the share of the former spouse or his or her spouse, as the case may be, in the property, lease or bond.”

[19] Mr Wessels sought to submit, as he had done in regard to the absence of a transfer of the property from the second respondent to Mrs A[...], that the absence of an application to have the title deeds endorsed meant that she was content to let matters lie as they were (on his submission that there had been no automatic division of the estate). The division took place on registration of the deed in the Deeds Office and it had in law the effect of divesting the second respondent of ownership and conferring it on Mrs A[...]. It is of no consequence in this matter that she has not applied for an endorsement.

Condonation

[20] The answering affidavit was filed out of time. An explanation has been proffered. It is not a particularly strong explanation but the merits are overwhelming; so must so that I am inclined to grant condonation

Costs

[21] Costs should in my view follow the result.

Order

[22] I make the following order:

1. The application for condonation is granted.
2. The application is dismissed with costs including the reserved costs.

A A LANDMAN

JUDGE OF THE HIGH COURT

APPEARANCES:

date of hearing

: 12 June 2014

date of hearing

: 19 June 2014

counsel for applicant : mr m wessels

counsel for 2nd respondent : adv l k van der merwe

attorneys for applicant : van rooyen tlhapi & wessels

attorneys for 2nd respondent : maree & maree attorneys

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