

SOUTH AFRICA / JUDGMENT

U v U and Others (15/98694) [2017] ZAGPPHC 678 (29 September 2017) [2017] ZAGPPHC 678

COURT

North Gauteng High Court, Pretoria

BEFORE

A Makume

CASE / FILE NUMBER

15/98694

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

OPPOSED

MOTION JOHANNESBURG

CASE

NO: 15/98694

DATE:

15/98694

In

the matter between: U.
J. E. (BORN
R.)
Applicant
and
I.
J.
U. First
Respondent
E.
K. T. I.
Second Respondent
J.
U.
NO
Third Respondent
J.
J. E. NO
Fourth Respondent
E.
T. (PTY)
LIMITED
Fifth Respondent
REPRESENTED
BY MATHYS JOHANNES
VAN
DEN BERG NO

JUDGMENT

MAKUME,J:

[1] This is an application in terms of Rule 10 (3) of the Uniform Rules of court in which the Applicant seeks an order to join the E. K. T. (the Trust), its trustees as well as E. T. (Pty) Ltd represented by one Mathys Johannes Van den Berg as second to fifth Defendants in an action between the Applicant and the First Respondent (the divorce proceedings)

The Applicant also seeks an order to amend the particulars of claim in her divorce proceedings to include second to fifth Respondents as second, third, fourth and fifth Defendants

[2] The Applicant and the first Respondent are spouses married out of community of property with the application of the Accrual System in terms of chapter 1 of the Marriage Property Act 88 of 1984.

[3] During or about December 2015 the Applicant issued summons against the first Respondent in which she seeks dissolution

of their marriage and an order that the first Respondent pay to her an amount equal to half of the difference between the accrual of their respective estates (the divorce proceedings).

[4] During or about April 2002 the Trust (Second Respondent) was registered at the instance of the first Respondent. First Applicant and Second Respondent are the trustees of the trust their two children C. J. U. and J. J. E. were nominated as beneficiaries.

[5] The basis on which the Applicant seeks to join the trust and its trustees in the divorce proceedings is with the intention to obtain the following relief:

5.1 That the assets of the trust be included in the assets or estate of the first Respondent.

5.2 Alternatively to 5.1 above that a declaratory order be granted that the assets ostensibly held by the trust are or were in fact the first Respondents assets and should be added to the first Respondent estate for purposes of calculating accrual in terms of Section 3,md 4 of the Matrimonial Property Act 88 of 1984.

5.3 Alternatively to 5.2 above that an order be issued to the effect that transactions reflecting the E. K. T. (The Trust) as acquiring and holding assets were simulated and that actually these assets were and are part of the first Respondent's assets.

[6] According to the Applicants the Trust property consists of farmland with livestock and improvements estimated to be valued at about R4 million. This value is disputed by the first Respondent.

[7] In the notice of amendment to the Applicants particulars of claim in the divorce proceedings the Applicant

maintains that she will present evidence to prove that the trust assets held ostensibly by the second

Respondent must be added to the net value of the first Respondents personal estate at the time of the dissolution of the marriage for purposes of calculating the accrual of the first Respondents estate in terms of Section 3 and 4 of the Marriage Property Act 1984.

[8] At the heart of this application is the Applicant's contention that the asset of the Elandskloof Kinder Trust are not only de facto but also de jure part of the assets of the first Respondent. Evidence to substantiate the Applicants contention will be presented to the trial court in the divorce proceedings not in this application. Indeed that was the approach of *Levenson Jin K & S Dry Cleaning Equipment v South African Eagle Insurance* 1998(4) SA 456 at 482 B where in describing the purpose and aim of Rule 10(3) said the following:

Our Rule permits the joinder of parties in the same proceedings but it does not direct the hearing of evidence as between all defendants, so that the extent of liability is determined between all parties and particularly not where no vestige of determination of such issue is incumbent on the court merely on the averment of the Plaintiff.”

[9] In opposing this application the first and third Respondents raised the following issues in the answering affidavit some of which were not followed up in the Respondents head of argument. The Respondents argue that:

9.1 The amendment sought by the Applicant is vague and embarrassing in that Applicant has failed to specify the assets and transactions in respect whereof the Applicant intends to claim the relief of accrual.

9.2 Secondly that the proposed amendments to the particulars of claim was not annexed to the application to enable the Respondents to consider the regularity and admissibility thereof.

9.3 That the proposed amendment if granted would be excipiable.

9.4 That the Applicant should have cited the Master of High Court as a party and served the application on the Master's office.

9.5 That the Applicant has failed to join the two children of the marriage being the beneficiaries of the Elandskloof Kinder Trust as they have vested interest and t'le relief sought could materially be prejudicial to their interest.

9.6 That similarly failure to join one Elsie Susan Uys who is a usufructuary of the farm which is registered in the name of the trust rendered this application unsuitable for a decision until she shall have been joined. She has material interest in the proceedings. It is argued by the Respondents that the relief will infringe on her right as the usufructuary.

10. THE INTENDED AMENDMENT

10.1 As I indicated earlier on this issue is not dealt with by the Respondent in their original as well as in their amplified heads of argument. 1 here was no indication that the Respondent have now abandoned that challenge.

10.2 In any case the complaint that the intended amendment is vague and embarrassing for failure to specify the assets has been cured. In the Replying Affidavit the intended amendment has been fully set out. It must be remembered that such amendment still has to be dealt with in accordance with Rule 28 of the Uniform Rules of Court. There is a procedure to be followed one, the Rule 28 notice has ben served. The objection if any in my view is not only misplaced it is also premature.

[11] FAILURE TO CITE/JOIN THE MASTER

11.1 This is in my view a technical defence which does not affect the validity procedural or otherwise of the Applicants case. In any case the joinder application was serv1 d on the Master on the 1st February

2017. The Master's office plays a regulatory role and has no interest in any dispute between the parties. Accordingly

this defence falls to be dismissed.

[12] FAILURE TO JOIN THE BENEFICIARIES

12.1 This seem to be the main objection and defence to this

application. The Respondents dealt with this aspect extensively in both the main and the amplified heads of argument.

12.2 The Respondents argue that because the two children, C. J. U. and J. J. E. are adults they should be joined simply because they have vested right in the trust.

12.3 it is not in dispute that the two beneficiaries have vested interest in the trust what is an issue is whether they should be joined as dependants in a divorce case involving their parents.

12.4 A beneficiaries basic right is that of insisting on the proper administration of the trust so that he or she can enjoy the benefits to which he or she is actually on potentially entitled to under the trust. In *Gross and Others vs Pentz* [1996] ZASCA 78; 1996 (4) SA 617 the court reiterated the general rule that trustees not beneficiaries have locus standi to act in legal proceedings on behalf of the trust it was however held that the general rule does not apply in the event where a beneficiary instituted action in his or her own right against the trustee for maladministration.

12.5 In this matter there is no reason why the beneficiary should be cited as there is no allegation of the trust being maladministered. The right if any of the beneficiaries remain as set out in the deed of trust.

12.6 In my view this defence has no merits and should be dismissed the trust is sufficiently represented by its trustees who have not at this stage been accused of any maladministration of the trust fund or assets.

13. FAILURE TO JOIN AND SERVE ON E. U. THE USUFRUCTUARY

13.1 It is common cause that Mrs E. S. U. Id Number: [...] is a usufructuary on the farm held in the

name of the E. K. T.. The Respondents argued that the relief claimed by the Applicants will infringe on her rights and therefore she should have been cited as a party to the proceedings.

13.2 A usufruct is personal right and does not form part of ones estate. That personal right confers only use and enjoyment during the life time of the usufructuary.

13.3 There is no indication or threat that if the application is eventually successful! in proving that the farm shall fall into the estate of the First Respondent that this will in anyway affect the right of use and enjoyment of E. S. U. over the farm. Her rights remain intact.

13.4 In any case Mrs Elsie Uys was served with all the documents the Notice of Motion and the intended amendment and was invited to join the proceedings if she so wishes she has not done so. The first Respondent has no mandate or authority to speak on her behalf. In my view the fact that she has decided not to intervene is proof that she sees no threat to her right as a usufructuary.

13.5 The Supreme Court of Appeal in BoE Trust Ltd and Others NNO 2013 (3) SA 236 at page 242 B dealing with an informal notice sent to possible beneficiaries of a bequest held as follow:

"The next question is whether a letter addressed to this court as appellate court, informing it that the charitable organisation have indicated that they abide the courts decision is enough to cure that failure by the Appellants. Put differently was the informal notice informing the charitable organisation of these proceedings and asking them if they wished to intervene (at the appeal stage) sufficient notice? Is this type of extra judicial notice sufficient? In my view it is. Eventually each of the charitable organisations was properly informed of the nature and purpose of the proceedings and unequivocally indicated that it would abide the decision of this court."

13.6 Accordingly and in my view Mrs S. E. U. silence means that she will abide the decision of the court. This matter should rest there and the defence of the non-joinder of Mrs E. S. U. falls to be dismissed.

14.

CONCLUSION

14.1 This being an application in terms of Rule 10(3) as I indicated earlier it is not the duty of this court to make a finding whether in fact the assets of the trust belong to the first Respondent or not. In the matter of Dendy v University of the Witwatersrand & others [2005] ZAGPHC 39; 2005 (5) SA 357 at page 387 the court held:

a That the trial court will have to determine in assessing the extent of the first Defendant's estate for the purposes of the Plaintiffs

accrual is whether the assets ostensibly held in the name of the trustees are in fact beneficially owned by the first Defendant as alleged by the Plaintiff."

14.2 I have been handed two (2) draft orders the first one joins Second to Fifth Respondents the second one include the two children and E. S. U. as Sixth, Seventh and

Eighth Defendants. I have already made a finding that failure to have joined them in this application is not defective however, for completion sake I propose to also join the three person as per the second draft order. I believe this will enable those who wish to file any papers to be part of that process.

14.3 Accordingly and in the result I make the following order:

1. The Trust (E. K. T.), The Trustess (I. J. U.N.O.; Abraham Janse Van Den Berg N.O.; C. J. U., J. J. E. and E. S. U.) are hereby joined as Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defendants in the divorce proceedings between the Applicant and the first Respondent.
2. The Applicant shall serve on the second to the eighth Defendants all the pleadings in the divorce proceedings within 10 days from date of this order.
3. The Applicant shall serve her notice of intention to amend her particulars of claim in accordance with Uniform Rule 28 on all the parties including the joined parties.
4. The First Respondent is ordered to pay the Applicants costs of this application on a party and party scale.

DATED at JOHANNESBURG this the 29 day of SEPTEMBER 2017.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

DATE OF HEARING 28 AUGUST 2017

DATE OF JUDGMENT SEPTEMBER 2017

FOR THE APPLICANTS ADV KILLIAN SC

INSTRUCTED BY ATTORNEYS

FOR THERESPONDENT ADV JF KUKARU

INSTRUCTED BY NADEEM MAHOMED ATTORNEYS

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Prepared on 12 October 2026 · Esheria