

SOUTH AFRICA / JUDGMENT

Y.M v T.J.M N.O and Others (2022-026526) [2024] ZAGPPHC 901 (5 September 2024)

[2024] ZAGPPHC 901**COURT**

North Gauteng High Court, Pretoria

BEFORE

M van Nieuwenhuizen

CASE / FILE NUMBER

2022-026526

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Policy**FLYNOTES:**

FAMILY – Divorce –
Accrual – Joinder
of trust and company – Piercing corporate veil –
Alleged that substantial value hidden – Has access
to
financial means beyond that which is disclosed – Intention
to obtain an order that assets be regarded as assets
of
respondents' estate – Ought to be taken into account
for purposes of calculating accrual – Relief applicant
intends to obtain will substantially and prejudicially affect
trust and company – Joinder is necessary and granted.
IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA
CASE
NUMBER: 2022-026526
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)

REVISED: YES.
DATE: 5 September 2024
In
the matter between: -
Y[...]
M[...]
Applicant
and
T[...]
J[...] M[...]
N.O.
First respondent
H[...]
C[...] M[...]
N.O.
Second respondent
RUDI
JANSE VAN RENSBURG N.O.
Third respondent
M[...]
BOERDERY (PTY) LTD
Fourth respondent
T[...]
J[...]
M[...]
Fifth respondent
MASTER
OF THE HIGH COURT
Sixth respondent

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e mail and publication on CaseLines. The date for hand-down is deemed to be 5 September 2024.

M VAN NIEUWENHUIZEN AJ:

INTRODUCTION

- [1] The applicant and the fifth respondent are the plaintiff and defendant to a divorce action. The applicant seeks the joinder of the first, second, third and fourth respondents as the second, third, fourth and fifth defendants to the divorce action under case number 26526/2022.
- [2] The applicant seeks the joinder of the first, second and third respondents in their capacities as trustees of the AP M[...] Family Trust with registration number IT000147/2017 ("the trust").

- [3] The first to fifth respondents (“the respondents”) oppose the relief sought by the applicant for their joinder.
- [4] The parties were married to each other on the 17th of September 2016, at Pretoria, out of community of property, subject to the accrual system, which marriage still subsists. In the divorce action the applicant (plaintiff) inter alia claims that the fifth respondent (the defendant) be ordered to pay to the applicant an amount equal to half of the difference between the accrual in the estate of the parties determined in accordance with the provisions of chapter 1 of the Matrimonial Property Act, 88 of 1984.

APPLICANT’S CONTENTIONS

- [5] The applicant contends that the trust and the company (fourth respondent) has a substantial interest in the divorce proceedings in that she claims that there will be a substantial accrual in the estate of the fifth respondent, which de facto assets are owned by the fourth respondent, of which the fifth respondent is a director and which shares in the fourth respondent are owned by the AP M[...] Family Trust, represented by the first to third respondents and of which the fifth respondent is both a trustee and a beneficiary.
- [6] The fourth respondent owns the farm on which the fifth respondent resides, better known as Burgershoop and Elandspoort and which is 1 600 hectares in size and is valued, less the movables, at approximately R12 million (twelve million Rand), the aforesaid being the purchase price for the farm. The fifth respondent is a director of the fourth respondent.
- [7] The farm, owned by the fourth respondent, which is in turn owned by the AP M[...] Family Trust, is alleged to be a fully functioning working farm which owns farming implements, machinery, tractors, harvesters, several hundred cattle, sheep and other livestock which it constantly buys, raises and then sells at auction. It is the applicant’s contention that the sales from all cattle and other livestock purchases and sales are mostly done in cash, as is the purchase of most farming implements and machinery.
- [8] The aforesaid does not appear to be in dispute – it is alleged by the respondents that the fifth respondent, despite being a director of the fourth respondent and a trustee and beneficiary of the trust, is merely a farm labourer on the farm.[1]
- [9] Insofar as the fifth respondent’s earnings and/or financial strength are concerned, it is alleged by the applicant that the fifth respondent effectively lives out of the company and/or the trust. The applicant states that this has been extensively dealt with in rule 43 proceedings. The fifth respondent allegedly earns a meagre salary of R6 000.00 per month from the fourth respondent as a farm labourer. The fourth respondent thereafter pays for the remainder of the fifth respondent’s expenses, lifestyle, expensive hobbies, entertainment and the maintenance of the applicant and the fifth respondent’s children.

- [10] The applicant alleges that the fifth respondent pleads poverty. The fifth respondent denies that he owns any assets, which could be taken into consideration for the determination of the value of his estate for the purposes of calculating the accrual.
- [11] The applicant contends that prima facie there is a likelihood that the fifth respondent is hiding behind the veil of the company and/or the trust and hence hides the true value of his estate for the purposes of calculating the accrual in the divorce action.
- [12] The aforesaid was also highly contested in rule 43 proceedings before this court and in that regard the rule 43 court has ordered that an amount of R805 903.00 be paid by the fifth respondent to the applicant for the purposes of conducting an audit into the financial relationship between the fifth respondent, the trust and the fourth respondent company.
- [13] The fifth respondent allegedly has expenses of R30 000.00 per month. However, when one considers the fifth respondent's bank statements there is no record of such expenses being paid by the fifth respondent.
- [14] Further, despite only earning R6 000.00 per month and his expenses being R30 000.00 per month, the fifth respondent personally owns cattle to the value of R538 594.00, which has allegedly been sold and which funds have allegedly been borrowed to his father. The applicant contends that there is no explanation as to where such funds were obtained and as such, it is argued that the fifth respondent has access to financial means beyond that which he discloses.
- [15] The applicant argues that regardless of where the company and trust obtained the assets, it is apparent that during the course of the applicant and the fifth respondent's marriage, the company became and is the owner of the farm properties. The fifth respondent's father is no longer the owner of any of the property sold and/or transferred to the company and save for being a beneficiary of the trust, has no involvement in the running of the trust, nor any involvement in the running of the company.
- [16] The applicant argued that there is no possible basis that the transactions described by the respondents in their answering affidavit could possibly be estate planning on the part of the fifth respondent's father when he has no stake, save for a reduced and limited benefit as a beneficiary in the trust, in the property concerned and further has no control over his "own purported estate".

COMMON CAUSE FACTS

[17] The following facts and/or circumstances are common cause between the parties: -

[17.1] The fourth respondent company owns the farm, which in turn is owned by the trust;

[17.2] The fifth respondent is a director of the fourth respondent[2] and is furthermore a trustee of the trust;[3]

[17.3] The fifth respondent is a trustee of the trust, which owns the company of which the fifth respondent is a director and which trust in turn owns the company.

[18] The applicant and the fifth respondent were married to each other on 17 September 2016.

[19] The farm properties were sold and/or transferred to the company during or about 2019.

[20] The trust was established during the course of the marriage between the applicant and the fifth respondent during or about July 2017.

[21] The fourth respondent company was incorporated during the course of the marriage, on or about the 17th of November 2017.

[22] The fifth respondent's father is: -

[22.1] no longer a director of the company, having resigned in May 2022;

[22.2] not a shareholder of the company;

[22.3] not a trustee of the trust.

RESPONDENTS' CONTENTIONS

[23] The respondents contend that the trust and company are not even informed what the nature and extent is of the relief that the applicant intends to seek against them in the event that they are all joined in the divorce action – more particularly in that a draft amended particulars of claim has not been attached to the application.

[24] The respondents contend that the applicant has miserably failed to demonstrate that the trust and company have a direct and substantial interest in the divorce action and has failed to satisfy the requirements for an application for joinder. The respondents contend that the entire application is predicated on the applicant's subjective belief and speculation, which are not in any respect supported by any evidence.

[25] The applicant's application for joinder is based on an unsubstantiated subjective belief that there will be "a substantial accrual" in the estate of the fifth respondent, which she alleges to be "hidden behind the veil" of the company and the trust.

[26] The respondents allege that the applicant has not met the requirements to "pierce the corporate veil". With reference to the matter of *NJK v IIK*[4] the respondents contend that it must be shown that the person has placed his own assets which originate from him, in a different entity to evade liability or escape an obligation – which the applicant has failed to show.

[27] With reference to *W v W N.O. and Others*[5] the respondents aver that the allegations in the founding affidavit don't support any cause of action against the trust or the company and even if the applicant's averments were accepted as true, it was insufficient and incompetent to support a cause of action against the trust and that the application for the joinder sought ought to be dismissed.

DELIBERATION

[28] It is trite that it is open to a party to join any party against whom he/she believes a cause of action arises. The test is whether the party to be joined has a direct and substantial legal interest in the order the court might make. The interest will be direct and substantial if such order cannot be sustained or brought into effect without prejudicing the interests of the parties sought to be joined.[6]

[29] The issue of joinder should not be conflated with the issue whether the party seeking joinder has a good case against the party sought to be joined. The court is not at this point required to assess the merits of the applicant's claim against the trust and/or company. It is sufficient for the applicant at this point to set out the reason for the joinder.[7]

[30] The respondents' defence that no case is made out at this stage that the fifth respondent is using the company and/or trust as a vehicle to accumulate personal wealth to the exclusion of the applicant and in so doing, has placed such assets outside of his estate for the purposes of calculating the accrual in the divorce action, does not have to be considered at this stage. [8]

[31] Should the applicant succeed at trial in proving that the farm and its assets, ostensibly owned by the company and which company is ostensibly owned by the trust, are the de facto property of, or a portion thereof, is the de facto property of the fifth respondent, then those values should be taken into account in determining the extent of the accrual of the estate of the fifth respondent.[9] The approach at this stage is to accept the applicant's allegations as correct.[10]

[32] The court at this stage must decide only whether on the allegations before it, if proven at trial, the applicant would be entitled to the relief it would ultimately seek.[11]

[33] In *The South African Riding for the Disabled Association v Regional Land Claims Commission and Others*[12] the Constitutional Court confirmed that: -

"The applicant does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient for such applicant to make allegations which, if proved, would entitle it to the relief."

[34] Although the applicant has not yet commenced with amending her particulars of claim and the fact that the applicant has not annexed such proposed amendment, it is evident that she intends to request the court to pierce the trust and corporate veil. It is evident from the founding affidavit that the applicant seeks to join the trust and the company in the divorce proceedings with the intention to obtain an order that the assets of the trust and/or

company (or portion thereof) be regarded as assets of the respondents' estate and ought to be taken into account for purposes of calculating the accrual. The relief the applicant intends to obtain will substantially and prejudicially affect the trust and/or the company and the joinder is necessary.[13]

COSTS

[35] It is fair towards all parties that the costs of the joinder application are costs in the divorce action.

ORDER

In the result, I make the following order: -

1. The first, second, third and fourth respondents are hereby joined as the second, third, fourth and fifth defendants to the divorce action under case number 26526/2022.
2. The applicant/plaintiff is directed to serve her amended summons and particulars of claim with annexures on the respondents within fifteen (15) days from date of serving of this order.
3. The first, second, third and fourth respondents are directed to deliver their notices of intention to defend within ten (10) days from date of service of the amended summons and particulars of claim on the first, second, third and fourth respondents, insofar as they intend to defend the proceedings.
4. In the event that the first, second, third and fourth respondents provide their notices of intention to defend the proceedings, then they are directed to deliver their pleas to the amended summons and particulars of claim, if any, within twenty (20) days from date of service of their notices of intention to defend.
5. The costs of this application are costs in the divorce action.

M VAN NIEUWENHUIZEN

ACTING JUDGE OF

THE HIGH COURT

DATE OF HEARING:

23 JULY 2024

DATE OF

JUDGMENT:

5 SEPTEMBER 2024

APPEARANCES:

On behalf of applicant: Adv Brook Stevens brookstevens@lawcircle.co.za Instructed by: Boshoff Smuts Incorporated nadia@boshoffsmuts.co.za / stephanie@boshoffsmuts.co.za On behalf of respondents: Adv U van Niekerk ulrike@uvnlaw.co.za Instructed by: De Oliveira Serrão Attorneys line@deoliveiraserrao.com / info@deoliveiraserrao.com

- [1] The fifth respondent in his confirmatory affidavit refers to himself as a “farm labourer” and in his plea and counterclaim as a “farm worker”.
- [2] Two of the fifth respondent’s siblings are co-directors with the fifth respondent of the fourth respondent.
- [3] The second respondent is a sibling of the fifth respondent and the third respondent is a chartered accountant and registered auditor.
- [4]
- 2023 (2) SA 158 (SCA).
- [5]
- (37634/2017) [2021] ZAGPJHC 710 (1 July 2021).
- [6] VW v VW and Others (627/2016)
- [2017] ZANCHC 26 (31 January 2017) at paragraph [8]; Amalgamated Engineering Union v Minister of Labour 1949
- (3) SA 637 (A); MLJ and AJ N.O. and Others Unreported judgment of Van der Schyff in this division issued on 20 May 2022 under case number 50044/2011 at paragraph [10].
- [7] MLJ & AJ N.O. and Others ibid paragraph 10.
- [8] RP v DP and Others 2014
- (6) SA 243 (ECP) where the court held: - “It is unnecessary for the 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. I believe the correct approach in considering the application for joinder and amendment, is to decide whether, if applicant’s allegations are found to be proven by the trial court, she has met the legal requirements for a joinder and amendment.” See also EEVW v PJVW case number 627/2016, NC (31 January 2007); Gordon v Department of Health, KwaZulu-Natal 2008 (6) SA 522 (SCA).
- [8] RP v DP and Others 2014
- (6) SA 243 (ECP) where the court held: -

“It is unnecessary for the 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. I believe the correct approach in considering the application for joinder and amendment, is to decide whether, if applicant’s allegations are found to be proven by the trial court, she has met the legal requirements for a joinder and amendment.”

See also *EEVW v PJVW* case number 627/2016, NC (31 January 2007); *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA).

[9] *BC v CC and Others* 2012

(5) SA 562 (ECP) at paragraph [18].

[10] *BC v CC and Others* (supra) at paragraph [11].

[11] *International Pentecost Holiness Church In re: MBS v BMS and Another* (63920/2020)

[2022] ZAGPPHC 296 (5 May 2022) at paragraph [14] where the court held that the applicant “does not have to satisfy the court at the stage of intervention that it will succeed. It is sufficient, if such application make allegations which, if proven, would entitle it to the relief”. And further: “It should be noted that it is not necessary for the applicant to satisfy the court that it will succeed in this case. It is

sufficient for the applicant to rely on the allegations made which, if established in the action, would entitle the applicant to

succeed. In assessing the applicant’s standing, the court must assume that the allegations made by the applicant are true and correct. Further, the possibility that the applicant’s legal interest exists is sufficient. It is not necessary for the court to determine positively that it does indeed exist.” (at paragraph [23]).

[12] CCT1172/16 [2017] ZACC4; 2017 (8) BCLR 1053 (CC); 2017 (5) SA 1 (CC) (23 February 2017) at paragraph [9].

[13] *MLJ and AJ N.O. and Others Unreported judgment of Van der Schyff* in this division issued on 20 May 2022 under case number 50044/2011 at paragraphs

[11] and [12].

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Prepared on 10 October 2026 · Esheria