IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 12987/2003

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

SIGNATURE

DATE 29/6/2013

In the matter between:

DE LANGE, HESTER MAGARETHA (formerly SMIT, born VAN DER WALT)	Applicant
And	
SMIT, JOHANNES GOTTLIEB	First Respondent
PRAKKE, A E	Second Respondent
COETZEE, F W J, N.O.	Third Respondent
THE SHERIFF, ROODEPOORT	

JUDGMENT

KOLBE AJ:

INTRODUCTION

[1] On 7 July 2003, almost 10 years ago, the Plaintiff commenced divorce proceedings against the First Respondent. On 25 May 2006 a settlement agreement was made an order of Court in terms of which a Mr Watkinson was appointed as referee in terms of Section 19 *bis* of the Supreme Court Act 59 of 1959, to determine the value of the accrual to the respective estates of the Applicant and the First Respondent.

[2] Paragraph 5.7 of the settlement agreement reads as follows:

> *"Once the referee's report has been adopted by the above Honourable Court in terms of payment by either party to the other, shall, in the absence of an agreement between the parties, be determined by the above Honourable Court."*

[3] The agreement further provided for the costs of the divorce action to stand over for argument once the Court had adopted the referee's report. In terms of Section 19 *bis* (6) the reasonable remuneration and expenditure by the referee would be costs in the cause.

[4] The Applicant and the First Respondent subsequently decided that Mr Warren Watkinson was too expensive and the Second Respondent was

appointed as referee.

[5] It is common cause that to date no report has been compiled by the Second Respondent.

[6] The Second Respondent's failure to compile a report resulted in the Applicant initiating proceedings for his substitution. This Application was on 26 March 2010 by agreement removed from the roll and the Second Respondent, by order of the Court, afforded 90 days from date of the order to conduct his investigation and submit a report to the Court in accordance with the order of 25 May 2006. It was also ordered that the costs of that application would be costs in the liquidation of the estate of the Applicant and the First Respondent.

[7] At some stage the Applicant instructed her attorneys to execute against the First Respondent. This resulted in a return *nulla bona* on the strength with which the Applicant on 11 October 2008 applied for the sequestration of the First Respondent. This application was on 29 April 2009 dismissed with costs.

[8] When the Applicant failed to pay the said costs, the First Respondent caused certain of her movable assets to be attached and sold in execution for an amount of R1 880,00.

[9] The Applicant later reneged on undertakings to pay the costs and the Sheriff on 14 September 2010, on the instructions of the First Respondent, attached the right, title and interest of the Applicant in her anticipated accrual claim acquired in terms of the divorce order dated 15 May 2006 ("the claim") which was on 9 December 2010 sold at public auction to the First Respondent's attorney, Mr van Rensburg, for the sum of R600, 00 plus VAT.

THE PRESENT APPLICATION

[10] The present application is for the removal of the Second Respondent and his replacement by one Mr Culhane alternatively for the setting aside of the sale in execution.

[11] The First Respondent's case is that the Applicant has no *locus standi* to apply for the removal of the Second Respondent having been divested of her claim.

[12] The First Respondent further contends that the Applicant selected the Second Respondent as well as his predecessor and that there seems to be no reason why the situation would improve if anybody else were to be appointed.

[13] As the Second Respondent was appointed by the Court to conduct an

investigation and to report back to the Court but failed to do so, he was, with the consent of the parties, called to explain his failure to comply with two court orders.

[14] His explanation was that he received no co-operation from either the Applicant or the First Respondent, that both purported not to possess any assets and that he was in any event informed by Mr van Rensburg, who had acquired the Applicant's claim that he did not wish to pursue the matter and should close his file.

[15] The letter addressed to him by the Second Respondent's attorney on the 10th of December 2010 reads as follows:

> *"7. Writer hereby advises that he has no interest in pursuing the claim against Mr Johannes Gottlieb Smit and would appreciate you to finalise your papers in this instance.*
>
> *8. Kindly may we request you to confirm receipt of this letter and only to produce the contents of this letter to Dr de Lange (previously Smit), or her attorney, on demand."*

[16] This letter, in my view, stated nothing more that that the Second Respondent, who was appointed by the Court and instructed by the Court to

produce a report, should finalise his papers.

SETTING ASIDE OF THE SALE IN EXECUTION

[17] It will be convenient first to deal with this relief which is sought in the alternative in the Notice of Motion, as at the commencement of the hearing, the Applicant moved for an amendment to the Notice of Motion to provide for the relief presently sought in the alternative to be sought in addition to the principal relief.

[18] At the time I indicated that the amendment together with the First Respondent's point *in limine* namely that the Applicant has, by virtue of the sale of her claim, lost her *locus standi* to bring an application for the removal of the Second Respondent, would be decided with the merits of the matter.

[19] After hearing argument on the merits and in view of the conclusion I have reached in the matter, I am satisfied that the amendment would not prejudice the First Respondent in the conduct of his case and is consequently granted.

[20] AS already stated, the First Respondent contends that the Applicant has, by virtue of the sale of her claim, lost her *locus standi* to bring an application for the removal of the Second Respondent.

[21] In this regard it is contended on behalf of the Applicant that the sale in execution falls to be set aside as it was *mala fide* and an abuse of this Court's process which should not be countenanced by the Courts and that in any event the Applicant was not divested of her interest in the costs order in the divorce action and that the sale in execution did not relieve the Second Respondent from his duty notwithstanding the letter addressed by the Second Respondent's attorney referred to above.

[22] I agree with the submission by Mr Sieberhagen that notwithstanding the sale in execution of the Applicant's claim she was not divested of her interest in the costs order and that the letter by Mr Van Rensburg did not relieve the Second Respondent of his obligation to produce a report.

[23] I am in any event of the view that the attachment and sale in execution of the Applicant's claim fall to be set aside.

[24] Mr Sieberhagen on behalf of the Applicant referred me to a number of judgments that dealt with sales in execution, which had as its sole purpose, to deprive a party of his claim and case law relating to abuse of a Court's process.

[25] Mr Aucamp, on behalf of the First Respondent, referred me to various decisions confirming the principle that an ulterior purpose with following a

specific procedure cannot in it render an otherwise lawful procedure unlawful.[1]

[26] I do not intend summarising all the case law referred to in the comprehensive and very helpful additional heads of argument submitted by both counsel. The question is simply whether the attachment and sale in execution was lawful.

[27] The relevant portions of Rule 45(8) read as follows:

> *"(8) If incorporeal property, whether movable or immovable, is available for attachment, it may be attached with out the necessity of a prior application to Court in the manner hereinafter provided:*
>
> *(a) .....; (b) .....*
>
> *(c) In the case of the attachment of all other incorporeal property or incorporeal rights in property as aforesaid,*
>
> *(i) the attachment shall only be complete when –*

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[1] See: **Brummer v Gorfil Brothers Investments (Pty) Limited and Another** 1999 (3) SA 389 (SCA) at 414 I – 414 B and 417 B

(a) a notice of the attachment has been given in writing by the Sheriff to all interested parties and where the asset consists of incorporeal immovable property ..., and

(b) the Sheriff shall have taken possession of the writing or document evidencing the ownership of such property or right or shall have certified that he has been unable, despite diligent search, to obtain possession of the writing or document;

(ii) ....."

[28] There is no indication that the Second Respondent received written notice of the attachment or of compliance with Rule 45 (8) (c) (I) (c).

[29] As far as written notice to the Applicant is concerned, she admits that she was served with an attachment notice but could not read the document served on her.

[30] In answer to this averment, which is denied by the First Respondent, the Respondent merely attaches the return of service, which is of course

prima facie proof of the contents thereof, but does not deal with the averments by the Applicant with respect to the legibility of the document served on her or her conversation with the Sheriff.

[31] I keep in mind that these are application proceedings but I am nevertheless of the view that it has not been shown that the attachment of the claim was complete as envisaged in Rule 45 (8). It follows that there was no attachment, and the sale in execution unlawful and falls to be set aside.

[32] It is consequently not necessary to deal with the averment that the sale in execution constitutes an abuse of this Court's process. I shall confine myself to an observation that the Applicant as well as the First Respondent's conduct leaves much to be desired.

[33] There was no tender to restore to Mr Van Rensburg what he had paid at the auction and he was not sited as an interested party. However, he was in Court and as the attorney of the Second Respondent, had sufficient notice of the proceedings and in any event, indicated that he did not intended perusing the claim. He clearly has no interest in the outcome of this application.

[34] It follows that that the Applicant has the required *locus standi* to apply for the removal and substitution of the Second Respondent.

REMOVAL OF THE SECOND RESPONDENT AS REFEREE

[35] It is clear that the Second Respondent's failure to produce a report was not due to any unwillingness on his part to finalise a report. He received no co-operation from the Applicant or the Second Respondent, was furthermore faced with an indication by both these parties that they possessed no assets and then received a letter from Mr van Rensburg that he did not wish to pursue the claim.

[36] The Second Respondent was appointed at the suggestion of the Applicant. There is no guarantee that substitution of the Second Respondent will resolve the present impasse.

[37] I am not satisfied that a proper case has been made out for the removal and replacement of the Second Respondent.

[38] This matter must however now come to finality.

[39] In the result I make the following order:

1. The Notice of Motion is amended by deleting the unnumbered paragraph between paragraphs 3 and 4 in the Notice of Motion.

2. The First Respondent's point *in limine* that the Applicant lacks

the required locus *standi* to apply for the removal and replacement of the Second Respondent is dismissed.

3. The purported attachment on 14 September 2010 and as well as the subsequent sale in execution on 10 December 2010 of the Applicant's right, title and interest in her anticipated accrual claim acquired in terms of the divorce order dated 15 May 2006 right, is hereby set aside.

4. The Applicant is ordered to pay the sum of R686, 00 to Mr van Rensburg should Mr Van Rensburg demand payment.

5. The application for the removal of the Second Respondent is dismissed.

6. The Applicant and the First Respondent are ordered:

   6.1 Within 20 court days of the date of this order to provide the Second Respondent with a schedule of his or her own assets as well as a schedule of what he/or she states the assets of the other party consisted of as at the date of divorce together with such supporting documentation as he or she wishes to attach to the schedule;

6.2 Within ten court days of the date referred to in paragraph 6.1 supra the Applicant and the First Respondent shall respond in writing to the aforesaid schedules to each other and to the Second Respondent;

7 The Second Respondent is ordered within twenty court days from the date referred to in paragraph 6.2 *supra* on the information available to him, to finalise his report, to provide the Applicant and the First Respondent with his final report and to file the report with this Court.

8. After receipt of the final report by the Second Respondent, as aforesaid the Applicant and/or the First Respondent may take such steps as may be required to have the issue with respect to the accrual in their respective estates and the costs of the divorce action enrolled for hearing.

9 The costs of this application will be costs in the liquidation of the estates of the parties.

KOLBE AJ