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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION (PRETORIA)
VIRTUAL HEARING

(1) REPORTABLE: YES
 (2) OF INTEREST TO OTHER JUDGES: YES
 (3) REVISED
 30/9/2021

CASE NO: 15857/2018

In the matter between:

D[....] B[....]

APPLICANT

and

ZEDA CAR LEASING (PTY) LTD
SHERIFF OF THE HIGH COURT, BOKSBURG
REGISTRAR OF DEEDS JOHANNESBURG
MC B[....]
FIRST NATIONAL BANK LIMITED

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

MALI J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by E-mail. The date and time for hand - down is deemed to be on 15h00 on 30 September 2021

- [1] This is application for an order to set aside the attachment of the movable property by the second respondent on the instance of the first respondent. The movable property in question had been attached to satisfy the debt wherein the applicant's former husband bound himself as the surety and co-principal debtor.
- [2] The notice of motion amongst other reads as follows;
"1. That the goods attached by the Second Respondent on 23 May 2019 belong to the Applicant;
2. That the goods attached by the Second Respondent on 23 May 2019 should be released to the Applicant;"
- [3] The first respondent opposes the application and has also launched a counter application.
- [4] The second respondent, the sheriff of the High Court (*"the sheriff"*), did not oppose the application.

THE MAIN APPLICATION

- [5] The applicant was married to Mr M[....] C[....] B[....] ('Mr B[....]') on 18 April 1992 in community of property. On 31 May 2007 the first respondent and a Corporation named Sabcool CC duly represented by Mr B[....] entered into a Full Maintenance Lease Agreement for the lease of motor vehicles.
- [6] On 2 May 2010 Mr B[....] bound himself as the surety and co- principal debtor, jointly and severally for the due and proper payment by Sabcool for all amounts that it may owe then and in the future from whatsoever causes arising. Sabcool fell into arrears in its obligations to the first respondent in the sum of R14 554.957.73. Sabcool was liquidated on 26 September 2017.
- [7] On 26 February 2018 the first respondent issued summons against Mr B[....] in his capacity as the surety and co-principal debtor for due payment of the debts of Sabcool. Summons were duly served on him on 7 March 2018, for which he did not enter appearance to defend. On 10 May 2018

the applicant and Mr B[....] signed a settlement agreement intended to govern the terms of their divorce; and they indeed divorced on 20 June 2018.

- [8] On 23 July 2018 the first respondent obtained a judgment in the amount of R14 065 077.47 together with interest against Mr B[....]. On 14 November 2018 the second respondent, attended to the residence of the applicant in an attempt to execute the warrant in respect of movable goods. The warrant was not executed on that day, because the applicant informed the second respondent that all assets and furniture in property belong to her as a result of the divorce order.
- [9] Ultimately on 23 March 2019, the warrant was successfully executed resulting in the second respondent attaching the assets on the premises as per the notice of attachment. The applicant remains in occupation of the immovable property; which is bonded with First National Bank and Mr B[....] makes the bond repayments.
- [10] The issue for determination is whether the applicant is protected by the divorce settlement agreement entered between her and Mr B[....] in respect of the property sought to be released from attachment.

APPLICABLE LEGISLATION

- [11] Community of Property between the spouses comes to an end at the dissolution of the marriage. See **Hay v Hay** 1910 NPD 90 - 9.1 But a creditor may proceed against the husband for the recovery of the full amount for a debt incurred during the subsistence of the marriage in community or against the wife for half the debt.

THE MOTOR VEHICLE

- [12] Amongst the movable property attached per notice of attachment annexed to the founding affidavit marked DB6 are household goods including furniture and a motor vehicle, Land Rover Discovery 4 with registration number [....] (*"the vehicle"*).
- [13] Clauses of the settlement agreement are to the effect that Mr B[....] would

transfer the vehicle to the applicant once it has been paid. It is common cause that the vehicle was still under finance during the hearing of the application. Further that Mr B[....] remains liable for all debts associated with movable assets and the immovable property registered in the name of both the applicant and Mr B[....].

- [14] The applicant amongst others raises the non- joinder of the financial institution, that the vehicle sought to be attached by the respondent is the property of the financial institution, the First National Bank ("FNB").
- [15] It is trite that the test for joinder requires that a litigant has a direct and substantial interest in the subject matter of the litigation which he/she may be affected by the decision of the court. In **Ex Parte Body Corporate of Caroline Court 2001 (4) SA 1230 (SCA) at 1238J - 1239** E Navsa JA said: *"It is a principle of our Jaw that interested parties should be afforded an opportunity to be heard in the matters in which they have a direct and substantial interest."*
- [16] The first respondent does not dispute that the vehicle is still under finance. It is therefore not the property of the joint estate. Nevertheless, it is not in dispute that the applicant is the one who instituted these proceedings fully knowing well who the owners are or interested parties to the attached assets. In legal terms she is *dominis litis*. It was well within her right to join the First National Bank, the financier of the motor vehicle. She cannot blame another party for her omissions.
- [17] From the foregoing the argument of non- joinder raised by the applicant is misplaced. In the result the point in lime cannot succeed.

ASSETS AND FURNITURE

- [18] According to the applicant the settlement agreement pertaining to the divorce gives her the right over other property. In the result the settlement agreement is an order of court. It is final and definitive.
- [19] In **Eke v Parsons 2016 (3) SA 37 (CC)** at paragraph 31 it is held that the effect of a settlement order is to change the status of the rights and obligations between the parties. It changes the terms of a settlement

agreement to an enforceable order. It is my understanding that no third party may be prejudiced by the terms of the settlement order. The order is intended to protect the former parties to the marriage against each other.

- [20] The law Per Nugent JA in **Du Plessis v Pienaar NO and Others**¹ at 674 J - 675 A – E is as follows:

"Once it is accepted that debts are incurred by persons, rather than by their estates, and that when the marriage is in community of property both spouses are generally liable for payment of the debts that are incurred by one of them, it follows that a creditor may look to the estates of both the debtors for recovery of the debt. (Own emphasis).

- [21] The law as stated above also goes for the argument proffered on behalf of the applicant that she was never cited as a party to the proceedings that resulted to the order and that there is no order granted against her. Mr B[....]'s liability as surety and co- principal debtor arose during the existence of the marriage to the applicant.

²The community of property marriage and the fact that the deed of settlement is inter esse (binding between the two of them) cannot exonerate the applicant. It is not amiss deducing from the time line of events to conclude that the divorce order was intended for Mr B[....] to evade paying his debts.

- [22] The applicant's submissions that Mr B[....] signed the surety and co-principal debtor agreement without her consent also cannot stand. The effect of Section 15 (6) of the Matrimonial Property Act 84 of 1984 is that a spouse acting in the ordinary course of his or her profession, trade or business does not require consent from another spouse. It is common cause that Mr B[....] was acting within the scope of his trade.

- [23] In the result the application cannot succeed. The following order is granted;

23.1 The application is dismissed with costs.

COUNTER APPLICATION

[24] In the amended notice of motion in respect of the counter application, the first respondent seeks the following relief;

- "1. That the Registrar of Deeds, Johannesburg be joined as the Third Respondent in this application; that M[....] C[....] B[....] be joined at (sic) the Fourth Respondent in this application and First National Bank Limited be joined as Fifth Respondent in this application;*
- 2. That service of this opposing affidavit on the attorneys of the Applicant and on [...] be deemed to be good and proper service on M[....] C[....] B[....];*
- 3. That the Third Respondent be directed to register a caveat against the immovable property situated at [...] prohibiting the Applicant and M[....] C[....] B[....] to sell, dispose of or otherwise encumber the immovable property;*
- 4. That the Applicant and M[....] C[....] B[....] be ordered to pay the costs of this counter-application on the scale between attorney and client;*
- 5. That further and/ or alternative relief be granted to the First Respondent."*

[25] The fifth respondent was represented; it was submitted that the fifth respondent shall abide by the order of the court.

[26] There is no need to repeat the law on joinder of the parties. The law stands as stated in paragraph 15 above. The undisputed legal basis for joining the third is purely administrative as it is the only party which can implement prayer number 3, above.

[27] In respect of Mr B[...] he is the judgment debtor in the proceedings leading to this application. Furthermore, by virtue that he was married to the applicant in community of property, he has direct and substantial interest in the proceedings.

[28] It is common cause that the First National Bank Limited also has direct and substantial interest as the bondholder in respect of the immovable property and also by the reason of being the financier of the motor vehicle.

- [29] The submission that service upon the attorneys of the applicant be deemed to be good and proper service upon Mr B[....] is supported by the reference to Mr B[....] as a "*miscreant*" who evades justice.
- [30] In supporting the above submission, the first respondent states that Mr B[....] visits the children at the address where the default judgment against him was served. There is no opposition by the applicant's attorneys in respect of Mr B[....] is not good and proper service. Furthermore, Mr B[....] did not oppose counter application.
- [31] In conclusion the law supported by the facts as shown above leads to the success of first respondent's counter application.

ORDER

1. The Registrar of Deeds, Johannesburg is joined as the Third Respondent in this application. The Third Respondent is directed to register a caveat against the immovable property situated at [....], Johannesburg prohibiting the Applicant and M[....] C[....] B[....] to sell, dispose of or otherwise encumber the immovable property;
2. Mr M[....] C[....] B[....] is joined as the Fourth Respondent in this application. This order shall be served upon Mr M[....] C[....] B[....] on the attorneys of the Applicant and on [....],
3. The First National Bank Limited is joined as Fifth Respondent in this application;
4. The Applicant and M[....] C[....] B[....] are ordered to pay the costs of this counter-application on the scale between attorney and client.

N.P. MALI

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant: Adv PA Wilkins

Instructed by: Strydom Attorneys

Counsel for the first respondent: Adv TP Kruger (SC)

Instructed by: Rothmann Phahlamohlaka Inc

Attorney for the fifth respondent: Ms Shelly Hwang

Instructed by Rossouws Lesie Inc

Date of hearing: 14 May 2021

Date of Judgment 30 September 2021.