

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 37634 / 2017

In the matter between:

WEIR-SMITH, CARA LEE

Applicant

and

WEIR-SMITH, DAVID N.O

First Respondent

WEIR-SMITH, ANNEMARIE HELENE N.O

Second Respondent

MC GLASHEN, TREVOR JOHN N.O

Third Respondent

RICHARD, GARTH LINCOLN N.O

Fourth Respondent

WEIR-SMITH, BRANDON N.O

Fifth Respondent

WEIR-SMITH, DAVID

Sixth Respondent

WEIR-SMITH, ANNEMARIE HELENE

Seventh Respondent

JUDGMENT IN THE JONIDER APPLICATION

MODIBA J:

- [1] This is an opposed joinder application in terms of Rule 10(3) of the Uniform Rules of Court, brought by Mrs Weir-Smith. She seeks to join the respondents as the second to eighth defendants to her counterclaim in a divorce action pending before this court. The respondents are resisting the joinder.
- [2] Mrs Weir-Smith also filed an application in terms of Rule 30, alternatively Rule 30 (2)(b) and Rule 30A (Rule 30 application) to have the respondents' answering affidavit in the joinder application struck out as an irregular step. The respondents filed an application to have certain paragraphs in Mrs Weir-Smith's replying affidavit in the Rule 30 application set aside as an irregular step.
- [3] To move the joinder application ahead, by agreement between the parties reached at the judicial case management meeting held on 30 November 2020, both parties are no longer pursuing the above interlocutory applications. The costs in each interlocutory application shall be costs in the divorce action.
- [4] Subsequently, the respondents filed an application to strike out certain paragraphs in Mrs Weir-Smith's replying affidavit filed in the joinder application (the striking out application). Mrs Weir-Smith filed a notice of intention to oppose the application but is in default of filing an answering affidavit. Therefore, the striking out application stands to be determined on an unopposed basis.

THE JOINDER APPLICATION

[5] Mrs Weir-Smith is the defendant in the divorce action. Mr Weir-Smith is the plaintiff.

He instituted the action in October 2017. Mrs Weir-Smith has filed a counterclaim in the divorce action.

[6] If she is successful in the joinder application, Mrs Weir-Smith also seeks leave to amend her particulars of claim in the counter-claim to give effect to the joinder and to seek relief against the joined respondents, jointly and severally with Mr Weir-Smith, the one paying the other to be absolved.

[7] The first to fifth respondents are co-trustees of the Tuscany Trust IT 2146/96 (the Trust). It is in that capacity that Mrs Weir-Smith seeks to join them to the counterclaim. In addition to being the founder and trustees of the trust, the capacity in which they are cited as the first and second defendant in the joinder application, Mr Weir-Smith Senior and Mrs Weir-Smith Senior are also the parents of Mr Weir-Smith and grandparents to the minor children born during the marriage between the parties. Mr Weir-Smith Senior is also the former sole proprietor of the Little Tuscany Boutique Hotel (the hotel).

[8] Mrs Weir-Smith also seeks to join Mr Weir-Smith Senior and Mrs Weir-Smith Senior in their personal capacities as the former sole proprietors of the Little Tuscany Boutique Hotel, as well as Mr Weir-Smith's parents and the grandparents to the parties' minor children.

[9] The respondents have filed a counter application. In the event that this court finds that Mrs Weir-Smith has made out a case for the joinder of Mr Weir-Smith Senior and Mrs Weir-Smith Senior in their capacity as the grandparents of the parties' minor children, in their counter application, the respondents also seek a joinder of Mrs Weir-Smith's parents in a similar capacity.

[10] The reason why Mrs Weir-Smith seeks to join the respondents to her counterclaim in the divorce action is that she believes that unless they are joined, she will be unable to enforce any judgment for the payment of the accrual and spousal and children's maintenance against Mr Weir-Smith. Hence, she simultaneously seeks an order, to amend her particulars of claim to hold the respondents jointly and severally liable with Mr Weir-Smith, the one paying the other to be absolved, for any judgement in her favour in her counterclaim in the divorce action.

[11] In the event that she is successful in the joinder application, Mrs Weir-Smith seeks costs against any respondent who opposes the application.

[12] It is common cause that the Trust is an *inter-vivo* trust, established with the objective of maintaining the beneficiaries financially. To make a case for joinder, Mrs Weir-Smith alleges that in terms of the Trust Deed the minor children and she are Trust beneficiaries as defined. She therefore contends that:

12.1 she has an interest in the accounts of the Trust to pursue and enforce her rights to payment of her share in the matrimonial accrual presently under the direct and indirect management and/ or control of Mr Weir-Smith and the co-trustees;

12.2 by virtue of being Mr Weir-Smith's spouse, she has a legitimate expectation to be maintained by the Trust. Further, she has a maintenance claim against the Trust post the divorce in terms of section 7(2) of the Divorce Act 70 of 1979;

12.3 as a guardian for the minor children who are entitled to be maintained out of the Trust, she has an interest in the finances of the Trust;

[13] Mrs Weir-Smith further alleges that:

13.1 Mr Weir-Smith Senior and Mr Weir-Smith are the effective mind and management of the Trust, the hotel and various entities formed, financed and managed by Mr Weir-Smith Senior and Mr Weir-Smith during her life partnership and subsequent marriage to Mr Weir-Smith disposed of by Mr Weir-Smith with the co-trustee's cooperation, partnership, acquiescence and assistance;

13.2 Mr Weir-Smith, Mr Weir-Smith Senior and Mrs Weir-Smith Senior are the *de-facto* beneficial owners of assets donated or alienated during the parties' marriage by one or more of them to the Trust;

13.3 she has a substantial accrual claim against the donated or alienated assets in the divorce action. If the parties she seeks joined are not joined to her counterclaim, she will not be able to satisfy this claim. Hence, she seeks these parties held jointly and severally liable with Mr Weir-Smith in her counterclaim.

[14] The respondents deny that there is any basis in law for the Trust to be held liable for Mr Weir-Smith's obligations arising out of the parties' ante nuptial contract (ANC) at the dissolution of the marriage. Mr Weir-Smith contends that Mr Weir-Smith, senior established the Trust in 1996 when Mr Weir-Smith was only 15 years old. He established the Trust for his wife and children's benefit. He also established the hotel business in the 90s. He grew it from a guest house to a fully-fledged boutique hotel. He retired from the hotel in 2018 due to ill-health. This prompted the restructuring of the hotel for estate planning, continuity and viability purposes with effect from 1 March 2019, approximately two years after the marriage between the parties broke down irretrievably.

[15] As part of the restructuring, the hotel was incorporated. The Trust holds shares in the hotel. The Trust is not a trading entity. It holds ownership in various immovable properties including the properties from which the hotel business operates. The latter properties are subject to a mortgage loan. The hotel business pays rental to the Trust which it in turn uses to maintain the mortgage loan.

[16] Mrs Weir-Smith's assertions fall to be rejected on the grounds of opposition advanced by the respondents.

[17] The joinder of parties to pending legal proceedings is regulated in terms of sub rule 10 (3). It provides that several defendants may be sued in one action either jointly or in the alternative jointly and severally, when the triable issue that arise in an action stands to be determined on substantially the same question of law or fact which, if such defendants were sued separately, would arise in each separate action. Hence, it has become trite that the second leg of the test for joinder is convenience.

[18] To succeed in this application, this court must accept the averments set out in the pleadings as correct and determine whether these are capable of supporting a cause of action against the Trust as alleged by Mrs Weir-Smith.

[19] Mr and Mrs Weir-Smith are married to each other out of community of property subject to the accrual system in terms of a duly registered ANC as provided for in Chapter 1 of the Matrimonial Property Act. In terms of section 2 of this Act, community of property and community of profit and loss, is excluded from the marriage between the parties.

[20] The parties made a declaration regarding the value of their respective estates at the commencement of their marriage (commencement values). At the end of their marriage by divorce or death of one of them, the value of their estates as at 17 September 2017 (termination value), being the date on which their marriage broke down irretrievably, will be used to determine the accrual. The commencement values will be deducted from their respective termination values. So is the parties' liabilities, any assets accruing to their respective estates after 17 September 2017, inheritances, donations and benefits accruing to any party including substitute assets and the fruits thereof, to which any of either Mr or Mrs Weir-Smith becomes entitled from an inter-vivos trust created by a third party for the benefit of any of them. The Trust here is such a trust. The latter items are excluded from the calculation of the accrual in terms of clause 4 of the ANC.

[21] Also excluded from the calculation of the accrual, in terms of clause 5.1.1 of the ANC is any claim on a loan account or cash received from the sale of an asset by the selling spouse to an inter-vivos trust, provided that the inter-vivos trust

guaranteed the selling spouse's obligations to the other spouse for the assets so sold.

[22] Assets, substitute assets and the fruits thereof acquired by the Trust on behalf of a spouse if, but for the acquisition of the Trust, the assets would have been acquired by that spouse are included in the calculation of the accrual.

[23] Any activities or transactions that occurred in each parties' estate after 17 September 2017 are irrelevant for the purpose of calculating the accrual.

[24] Clauses 4 and 5 of the ANC takes care of the concerns that prompted Mrs Weir-Smith to launch this application. It provides her with adequate protection of whatever accrual she is rightfully entitled to in terms of the ANC.

[25] Therefore, to the extent that Mr Weir-Smith transferred, alienated or donated any of his assets to the trust prior to 17 September 2017, such assets are deemed to be part of his estate and will be reckoned for the purpose of calculating the accrual. It is hardly necessary to join the trustees to enforce any claim that Mrs Weir-Smith may have against Mr Weir-Smith in this regard.

[26] The party with the lesser accrual will be entitled to 50% of the difference between the accrual of the spouse whose accrual is less and that of the spouse with a greater accrual. If Mr Weir-Smith's accrual is greater, Mrs Weir-Smith's accrual claim lies against him and not against any third party.

[27] In light of this legal position, Mrs Weir-Smith fails to meet the test for joinder for the purpose of attributing liability for the accrual claim against Mr Weir-Smith to the trustees, Mr Weir-Smith Senior and Mrs Weir-Smith Senior. To the extent that she

intends holding the respondents liable for her accrual in the event that she is entitled to any, Mrs Weir-Smith's joinder application is legally incompetent.

[28] Joinder for the purpose of claiming spousal maintenance from the trust is also legally incompetent because:

28.1 the maintenance benefit only accrues when the Trustees exercise a discretion to pay it. They are yet to exercise such a discretion in her favour;

28.2 the court has no powers to direct the Trustees to exercise their discretion in Mrs Weir-Smith's favour;

28.3 any entitlement that Mrs Weir-Smith may have to maintenance as a spouse against the Trust will end on the divorce date;

28.4 any post-divorce spousal maintenance that Mrs Weir Smith intends pursuing against Mr Weir-Smith lies against Mr Weir-Smith and not against the Trust as Mrs Weir-Smith will no longer be a Trust beneficiary as defined.

[29] For the same reasons articulated in paragraph 28.1 and 28.2 above, joinder for the purpose of claiming maintenance on behalf of the minor children against the Trust is also incompetent.

[30] The primary responsibility to maintain children lies with both parents. The grandparents' liability to maintain their grandchildren is a contingent liability, arising only in the event that the parents lack the means to maintain the children. Both Mr and Mrs Weir-Smith are economically active and have the responsibility to maintain their children according to their respective abilities.

[31] Under these circumstances, Mrs Weir-Smith also fails to meet the test for joinder for the purpose of claiming maintenance from Mr Weir-Smith Senior and Mrs Weir-Smith Senior in their capacity as the minor children's grandparents.

[32] In the premises, the joinder application stands to fail with costs.

[33] The respondents' application to join Mrs Weir-Smith's parents was only conditional upon Mrs Weir-Smith's application for the joinder of Mr Weir-Smith Senior and Mrs Weir-Smith Senior succeeding. Since it has failed, there is no basis to consider the respondents' counter application.

APPLICATION TO STRIKE OUT

[34] Mrs Weir-Smith's filed a replying affidavit in the joinder application. It is dated 18 December 2020. It consists of 99 pages without annexures. Inclusive of annexures, it consists of over 570 pages. The respondents object to this affidavit on the basis that:

- 34.1 it is extremely prolix;
- 34.2 it contains mainly new matter and irrelevant allegations;
- 34.3 it contains scandalous and vexatious matter;
- 34.4 the annexures are unduly prolix and repetitive, having being included in either the founding or the answering affidavit.

[35] They contend that it stands to be struck out in terms of Rule 6(15), alternatively the specified paragraphs and annexures stand to be struck out unless the court is satisfied that striking the replying affidavit out will be prejudicial to Mrs Weir Smith.

[36] The specified paragraphs and annexures stand to be struck out for the reasons advanced by the respondents. Any inconvenience that Mrs Weir-Smith stand to suffer as a result of striking out the specified paragraphs and annexures is not demonstrated.

[37] This court frowns upon the prolix replying affidavit and was unduly burdened thereby. It is one of the main factors that negatively impacted the prompt adjudication of the joinder application.

[38] Any inconvenience resulting from the delay in delivering this judgment is regretted.

[39] The following order issues:


ORDER

1. The joinder application is dismissed with costs.
2. By agreement between the parties, Mrs Weir-Smith's application in terms of Rule 30, alternatively Rule 30(2)(b) and Rule 30A as well as the respondents' application to strike out certain paragraphs in Mrs Weir-Smith's replying affidavit in the said application is withdrawn.

3. Costs in the applications referred to in paragraph 2 of this order shall be costs in the divorce action.
4. The following paragraphs and annexures from the applicant's replying affidavit dated 18 December 2020 are struck out on the grounds set out in the supporting affidavit filed by the respondents on the basis of them containing new matter in reply, which matter is irrelevant, scandalous and vexatious:
 - 4.1 Paragraphs 6 – 14
 - 4.2 Annexure "RA1" referred to in paragraph 8 including but not limited to the following annexures thereto U3, U4, U5, U6, U7, U8, U22, U23, U24, U25, U26, U29 and U30
 - 4.3 Paragraph 16 and annexure RA2 thereto
 - 4.4 Paragraphs 17, 60, 61, 62,63, 65-65.8, 66, 67, 68, 86 87, 88 and 89 and the annexures referred to therein
 - 4.5 Paragraph 18 and the sub-paragraphs thereto and annexure RA3 thereto
 - 4.6 Paragraphs 19 to 33 and 36
 - 4.7 Paragraphs 52 and the sub-paragraphs thereto and paragraph 53
 - 4.8 Paragraphs 57 and 59
 - 4.9 Annexures RA10, RA12, RA 13 and RA 14
 - 4.10 Annexure RA16
 - 4.11 Paragraphs 69 to 76 and annexures RA15 and 16 thereto
 - 4.12 Paragraphs 79 to 81 and annexures RA17 to RA20
 - 4.13 Paragraphs 83 to 91
 - 4.14 Annexure RA24

- 4.15 Paragraphs 127 to 128 and annexures RA26 to RA28 thereto
- 4.16 Paragraph 129 and the sub-paragraphs thereto
- 4.17 Paragraphs 135 to 138
- 4.18 Annexures RA30 and RA33
- 4.19 Paragraph 235

5. Mrs Weir-Smith shall pay the costs of the striking out application.



**MADAM JUSTICE L T MODIBA
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

APPEARANCES

Applicant, Ms Cara Lee Weir-Smith (In person)

Counsel for the respondents, M Feinstein
Instructed by M Pienaar, Schuler Heerschoop Pienaar Inc. Attorneys

Date of hearing: 2 February 2021

Date of judgment: 01 July 2021

Mode of delivery: this judgment is handed down electronically by circulation to the parties' legal representatives by email and loading on Caselines. The date and time for hand-down is deemed to be 2 pm on 01 July 2021.