(Western Cape Division, Cape Town)

[Reportable]

Case No: 4047/2021

In the matter between:

THE SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF BELLVILLE **First Applicant**

A BATCHELOR & ASSOCIATES INC **Second Applicant**

vs

NICHOLAS WALKER **Claimant**

DIANE **CROUS**
Respondent

Coram: *Mantame J*
Heard on: *13 October 2022*
Delivered on: *31October 2022*

JUDGMENT

MANTAME J

Introduction

[1] Before this Court, are the proceedings in terms of Rule 58 of the Uniform Rules of Court. The claimant filed interpleader proceedings claiming that the movable assets, itemised from 1 to 23 that were attached and removed by the Sheriff at 4 Gousblom Close, Plattekloof, Cape Town pursuant to the writ of execution granted by the Registrar of this Court against the respondent are his sole and exclusive property. This assertion is based on the fact that the claimant and the respondent are married to each other out of community of property. A copy of the ante-nuptial contract dated 11 November 2010 was annexed to the claimants replying papers as proof to that effect.

[2] This matter was initially set down for hearing on the motion court roll. However, due to the possible dispute of facts it was referred to the semi-urgent roll for oral evidence. It is for this reason that the matter came before this Court for oral evidence to be heard.

[3] The claimant appeared in person and the second applicant was represented by Mr Eia.

Background Facts

[4] On 23 February 2021, the sheriff attached the itemised movable goods at 4 Gousblom Close, Plattekloof, Cape Town, a shared residence by claimant and respondent pursuant to a writ of execution granted against the respondent in favour of the second applicant.

[5] The claimant stated that the attached goods are his property alone. On 3 March 2021, he proceeded to deliver an affidavit to the sheriff stating that the attached items were his sole property. On 24 March 2021, the sheriff uplifted the attached property as well as other items that were not listed in the inventory. On 21 April 2021, the claimant instituted these proceedings having the second applicant disputed the claimant's ownership of the attached items.

[6] It was not disputed that the debt that the sheriff was instructed to act upon emanated from the legal fees and disbursements that are due and payable to the second applicant by the respondent. On 19 September 2008, the respondent was involved in a motor vehicle accident that was driven by the claimant and sustained some injuries to her back. The respondent thereafter approached the second applicant to institute a claim for damages against the Road Accident Fund ("*RAF*") as she was unable to work and has not received an income as a result of the injuries sustained in the accident. According to the second applicant, due to the respondent's false and misleading instructions which ultimately sought to commit fraud against the RAF, the second applicant was obliged to ethically and professionally withdraw as respondent's attorney of record. Subsequent thereto, the second applicant caused a bill of costs to be drawn and taxed on 12 August 2020 for R538 477.55. The bill of costs having been presented to the respondent for payment, she failed to settle it. It was against this background that the second applicant caused a writ of execution to be issued against the respondent. The claimant accepted that the respondent owes the second applicant for legal fees.

[7] In bringing these proceedings, the claimant acknowledged that he no longer has receipts and/or invoices as proof of his acquisition of the listed items. Some items were purchased from individuals, auctions and so on. Even the items purchased from stores are no longer under warranty/guarantee. For all these reasons, he is unable to furnish evidence of ownership, besides what he has listed. Notwithstanding, he has attempted to make a handwritten note against his bank statements, what he believed was paid for using the bank cards.

[8] From the listed items, the claimant attempted to prove ownership of some items. For instance, concerning **Item 1,** the motor vehicle licence and licence disc ("*NW2*") reflected as Hyundai 110 CY 144005 is registered under N Walker (the claimant). This is the same vehicle under attachment that was said to have been sold for R30 000.00 to the claimant's mother-in-law. The allegations on record was that the claimant bought this car from his grandmother before marriage. Concerning **Item 4**, a note from G F Walker (claimants' father) dated 20 February 2020 titled, "*To whom it may concern*" ("*NW5*") advised that G F Walker is the owner of the ten (10) seater Blackwood dining table. In so far as **Item 14** is concerned, the claimant initially stated that he bought the silver dishwasher from Makro Milnerton. A handwritten note against his bank statement was reflected as proof of purchase to that effect *("NW10")*. In claimant's reply to the second applicant's response to his claim, an allegation was made that he made an error concerning that note. He has since discovered an invoice *("NW18"*) for the silver dishwasher and in fact, the item was bought from Tafelberg Furnitures in Montague Gardens. Concerning **Item 22** a till slip ("*NW14*") that served as proof that the Samsung 48 LED was purchased from Game Stores was attached.

The claimant stated that he utilized his funds to purchase this TV and he highlighted this amount from his FNB credit card statement.

[9] After the accident of September 2008, the claimant stated that the respondent sustained a severe back injury and her earning capacity was severely curtailed. She was unable to secure a job and she stayed at home as a full-time mother. She received no remuneration and was therefore unable to contribute financially to the running of the household. The claimant remained the sole breadwinner.

[10] Although the respondent played sporadically in poker tournaments and while initially she won substantially in her first two tournaments in 2014 and 2015, these winnings were either lost, expended on entry fees or travelling to international tournaments. By March 2018, the respondent incurred a net loss of just over R1 million.

[11] The second applicant indicated that the claimant is not taking this Court into his confidence. In fact, the claimant conceded that a significant amount of family income has been earned in Scylla Labour Management CC *("Scylla CC")* with registration number: 2009/081/020/23 in which the respondent was 100% member. This close corporation was registered seven (7) months post respondent's motor vehicle accident. During cross-examination, the claimant sought to explain that the respondent was the sole member on paper, otherwise, he was running the day to day business of this close corporation. He conceded that the income generated was used to run their household. The respondent merely signed the tender applications, as having the business in her

name was advantageous to them. Otherwise, the labour broking business was run by him and he was the sole bread winner.

[12] This issue, the second applicant said was not revealed when the second applicant prosecuted the respondent's claim against the RAF. In fact, this information was uncovered by the expert forensic accountant, Mark Edward *("Mr Edward")* in his report in the course of preparation for trial. When Mr Edward provided various FNB bank accounts in the name of Scylla CC owned by the respondent, this information came to the fore. This was after the respondent was presented as someone without an income or unemployed. For example, and on random selection, the Scylla CC bank accounts for 2012 and 2017 financial years reflected that the claimant had received the nett drawings during the 2012 financial year in an amount of R737 000.00 and the respondent's nett drawings were R97 000.00. For the 2017 financial year, the claimant received the nett drawings of R500 000.00 and the respondent just under R1.2 million. This was not declared or admitted by either the respondent or claimant.

[13] When confronted with this evidence during cross-examination, the claimant conceded, that all the items in which exclusive ownership, which forms the basis of the interpleader claim, were ultimately bought with monies derived from the business operations conducted by him on behalf of his wife, the respondent. He further conceded during cross-examination that all the items claimed had been used for the benefit of both himself and the respondent during the course of their cohabitation and marriage.

Discussion

In circumstances where the parties are married out of community of property with accrual, and clearly share profit and losses during the subsistence of their marriage, that which is precluded by their marriage regime, can one party to the marriage raise a defence that he had use and enjoyment of exclusive property at his own convenience?

[14] The claimant in this instance who is the husband of the respondent brought these proceedings before court on the basis that the attached items at their property are his sole property. The second applicant submitted that this Court should reject this argument on the basis that the claimant made concessions during cross-examination that the income derived from respondent's close corporation was utilised jointly. Clearly there was a commingling of business and personal expenses, purchases and joint use of the attached goods. In such a situation, it was not open for the claimant to invoke the legal consequences of his marriage when it suits him.

[15] It is common cause that the marriage regime between the claimant and the respondent is that of out of community of property with accrual system. Meaning, in a properly regulated marriage environment both spouses have separate estates, and when they get married they do not share profits and losses for the duration of the marriage. However, in the marriage between the claimant and the respondent, that was the total opposite.

[16] It was undisputed that the Scylla CC was registered in 2009. Initially, both the claimant and the respondent held 50% membership of the close corporation. During cross-examination, the claimant stated that he decided to resign from the close

corporation to pursue active employment. It was for this reason that the respondent held 100% membership. Despite that be the case, the claimant returned to the close corporation to operate it.

[17] This Court had an opportunity to observe the claimant while giving evidence and being cross-examined. He presented himself as a sharp-minded person and was able to anticipate questions even before they were imposed on him. During cross-examination, he was at pains to explain that although the Scylla CC was owned by his wife, he was the person who was responsible for its day to day business operations. That was evidenced by the fact that he did not have a set salary. He utilised the monies as and when they were available. However, that did not make him the owner of the close corporation. In my view, if the claimant was not legally employed by the close corporation and did not receive a standard salary, it follows then that the income generated, if regard is had to his marriage regime, was that of the respondent. Similarly, the evidence was that the assets they had were purchased from the income generated from the close corporation. Without a doubt, the respondent then becomes the owner of the assets.

[18] In his submissions, the claimant sought to deny that the items attached by the sheriff were purchased from the monies derived from the respondent's business. He suggested that a portion of the items was purchased by him before he was married to the respondent and before the close corporation was formed. This might be so, but without conclusive proof, in the form of receipts and invoices, this Court is unable to identify such items from the 24 attached listed items. On consideration of these items, there are only two (2) items that clearly belonged to the claimant or another person, i.e.

Item 1, the Hyundai 110 that previously belonged to his grandmother and was purchased by him and **Item 4,** the ten (10) seater Blackwood dining room table that belonged to his father. Other than those items, all the other items were not proved. The only item that had a slip, is **Item 22** and was said to have been bought from the claimant's credit card, the income was generated from the respondent's business. This Court cannot conclude that this was the claimant's sole property in the absence of proof that he was paid a salary or received dividends or drawings as partner in this business.

[19] This then brings this Court to a question on whether his claim that the attached property solely belongs to him by virtue of his marriage out of community of property. This argument is unassailable based on his concessions that the house they occupied was jointly owned by him and his wife and that the close corporation owned by his wife was the sole provider of the family income. Having the close corporation's bank account transferring funds to the claimant's bank account, it is therefore inconceivable as to how this Court would be able to ascertain conclusively which items belonged to the claimant and/or respondent and whose money was utilised to purchase this items. The claimant throughout the existence of the marriage, benefited immensely from the Scylla CC through this intermingling process from his wife. I repeat, he produced no proof that he was employed and had a stipulated income from which he accrued his individual estate. The conclusion to be reached is that all the purchases he made for the business and household were for the respondent.

[20] Having the claimant conceded that the finances between the claimant and the respondent were intertwined and/or interwoven, it is difficult for this Court to conclude

that the attached items belonged to the claimant alone. In any event, no proof was attached for this Court to be satisfied that indeed the items belong to the claimant. Their marriage regime is out of community of property, however, the conclusion to be drawn by this Court is that there was no line drawn in their day to day running of their personal and business transactions. Although they were married out of community of property, the claimant and the respondent treated each other's estate as their joint estate. Clearly, they shared profits and losses, that which is prohibited by their marriage regime. In my opinion, this claim was a thin veiled attempt to salvage the respondent's property. In my view, it is not open to the claimant to raise a defence arising from his marriage regime as and when it is convenient to him or when it suits him.

[21] Quite striking to the claimant's *bona fides*, he initially stated that the silver dishwasher ("*NW10*") was purchased by him from Makro (Milnerton) on 6 December 2009 for R4327.35. However, in his reply to the second applicant's response, he somehow stated that he came across an invoice during his packing in the process of moving houses and remembered that he bought this dishwasher at Tafelberg Furnishers (Montague Gardens) for R4999.00 on 2 January 2009. If indeed, the claimant is to be trusted, it is outrageous as to how this important issue could escape him as he was confident about his acquisition of the assets when he made his initial claim on this item. Coupled with this assertion is his advice during cross-examination that he has sold the Hyundai 110 that is currently under judicial attachment to his mother-in-law for R30 000.00. Despite this being the case, the car remained in his ownership and currently being used by him. Again, the claimant wanted this Court to believe that the respondent is a 'woman of straw', whereas that is not the case. This

boils down to the issue of credibility and trust and how much this Court should consider him reliable, trustworthy and honest.

[22] In exercising its discretion, the Court should be satisfied that the claimant has furnished full particulars of his claim. The purpose is to inform his opponent of the tenor of his case in order to enable the latter to decide whether or not to oppose the claim. The rule does not require the claimant to set out his claim with the same precision as in pleading.[1] It then follows that the Court should be satisfied and content that the items claimed by the claimant indeed belong to him. The claimant only managed to prove that only **Items 1 and 4** do not belong to the respondent. The attachment should therefore be uplifted on these items. Concerning the other items, there is no conclusive proof that they do not belong to the respondent.

[23] In circumstances where the claimant has failed to provide records, which in his own insistence, said were contained in his computer/s and further failed to convince the Court that it should find in its favour with regard to **Items 2, 3,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22 and 23**, it then follows that the interpleader claim should fail. Since the claimant has slightly succeeded in his claim, it then follows that he should pay costs.

[24] In the result, the following order is granted:

24.1 The claimant's interpleader claim is upheld in respect to **Items 1 and 4**;

[1] Corlette Drive Estates v Boland Bank Bpk 1979(1) SA 863 (C) at 867 G, approved in Kamfer v Redhot Haulage (Pty) Ltd 1979(3) SA 1149 (W) at 1153 - 4

24.2 The claimant's interpleader claims in respect of **Items 2, 3,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19,20,21,22 and 23** is dismissed with costs including storage costs

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MANTAME J
WESTERN CAPE HIGH COURT