THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable
CASE NO: 514/2001

In the matter between :

LOUISA DU PLESSIS	**Appellant**
and	
MARIANA PIENAAR NO	**1st Respondent**
NICO HENDRIK BOEZAART NO	**2nd Respondent**
ABSA BANK LIMITED	**3rd Respondent**
MASTER OF THE HIGH COURT	**4th Respondent**
SUSCA WATTS (BORN DU PLESSIS)	**5th Respondent**
PETRO DU PLESSIS	**6th Respondent**
LOURENS LEWIES DU PLESSIS	**7th Respondent**

Coram: **HARMS, CAMERON, BRAND, NUGENT JJA *et* HEHER AJA**

Heard: **10 SEPTEMBER 2002**

Delivered: **26 SEPTEMBER 2002**

Summary: **Spouse married in community of property – separate property – whether available to creditors upon insolvency of spouses.**

J U D G M E N T

NUGENT JA:

NUGENT JA:

[1] One of the ordinary consequences of marriage in community of property is that the property of the spouses is brought together in a joint estate that is owned by them in equal undivided shares. It is well recognised, however, that either spouse might also own separate property that is excluded from the joint estate (*Erasmus v Erasmus* 1942 AD 265; *Cuming v Cuming and Others* 1945 AD 201). The question in this appeal is whether that separate property is available to meet the claims of joint creditors of the spouses upon their insolvency.

[2] The question arises in the present case in relation to certain farms, equipment, and livestock that were inherited by the appellant upon the death of her father in 1983. At the time the inheritance accrued to the appellant she was married, in community of property, and the marriage is still in existence. The property was bequeathed to the appellant subject to a stipulation that it was not to form part of the joint estate of the appellant and her husband, that it was not to be subject to the marital power of the appellant's husband, and that it was not to fall within 'any possible insolvent estate' of the appellant's husband nor vest in the trustee of such estate.

[3] The appellant's husband carried on business as a moneylender for the benefit of the joint estate. The business fell upon hard times and on 19 March 2000 an order was made by the Transvaal Provincial Division finally sequestrating the joint estate of the appellant and her husband (which is the

usual form in which such orders are granted when the parties are married in community of property.) The first and second respondents are the trustees of the insolvent estate. (The remaining respondents played no role in the proceedings in this Court or in the Court *a quo*.) The trustees laid claim to the appellant's separate property for the benefit of creditors whereupon the appellant applied to the Transvaal Provincial Division for orders declaring that the property did not form part of the insolvent estate, prohibiting the trustees from selling the property for the benefit of creditors, and compelling them to restore the property to her. (The appellant also claimed other relief in the alternative but that claim was subsequently abandoned.) The matter came before Van der Westhuizen J who followed the decision of McLaren J in *Badenhorst v Bekker NO en Andere* 1994 (2) SA 155 (N) and dismissed the appellant's claims with costs but granted leave to appeal to this Court.

[4] The central premise upon which the various submissions made by the appellant was founded was that the debts that have given rise to the claims against the insolvent estate were debts that were incurred by the joint estate. That being so, it was submitted, they are recoverable only from the property of the joint estate, and not from the separate property of the appellant which falls outside the joint estate. The respondent's counsel, in an erudite and helpful argument, pointed out, correctly, that the premise for those submissions is unsound: Debts are not incurred by a person's estate - the estate is merely the source from which the debt is recovered. The debt is incurred, however, by the person who is the debtor. Accordingly the 'joint estate' did not incur the debts that are now sought to be recovered and it is not the insolvent debtor. The insolvent debtors are both the appellant and her husband, for when spouses are married to one another in community of property debts incurred by one spouse generally accrue to them both. (There

are exceptions that are not relevant to this appeal.) That was expressed as follows by Rabie JA in *De Wet NO v Jurgens* 1970 (3) SA 38 (A) at 47D-F and quoted with approval in *Nedbank Ltd v Van Zyl* 1990 (2) SA 469 (A) at 476B-E:

> 'Dit blyk duidelik dat die man en die vrou se skulde gemeenskaplike skulde is wat uit die gemeenskaplike boedel betaalbaar is. Hulle is dus eintlik medeskuldenaars. Dit is wel waar dat die man gewoonweg verantwoordelik is vir die betaling van skulde, maar dit beteken nie dat net hy skuldenaar is nie. Betalings word van hom geëis omdat hy in beheer van die boedel is, en hy word in die Hof aangespreek omdat, behalwe in sekere uitsonderingsgevalle, slegs hy voor die Hof gedaag kan word. Wanneer hy 'n vonnisskuld betaal, betaal hy dit uit die gemeenskaplike boedel, en wanneer hy 'n vonnisskuld nie betaal nie, word eksekusie teen die bate in die gemeenskaplike boedel gehef.'

[5] 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. In the case of a spouse such as the appellant that

estate comprises not only her undivided interest in the joint estate but also her separate property that falls outside the joint estate (see J.C. Sonnekus 'Insolvensie by Huwelike in Gemeenskap van Goed' 1986 *TSAR* 92 at 97; A.H. Van Wyk *The Power to Dispose of the Assets of the Universal Matrimonial Community of Property* unpublished doctoral thesis Leiden 1971 p. 60). The fact that some of her property is separately owned is relevant to the manner in which the property may be dealt with by the spouses *inter se* and to their rights upon dissolution of the marriage but does not affect the ordinary right of a creditor to look to all the property of the debtor in satisfaction of a debt.

[6] Similarly, the remedies provided for by the Insolvency Act 24 of 1936 are available against both spouses for recovery of the debt that is due by both of them. Before the Matrimonial Property Act 88 of 1984 came into

effect the husband, in whom the marital power vested, could be cited alone in proceedings for sequestration of the joint estate, but even then the consequence of such an order being granted was to render both spouses 'insolvent' as contemplated by the Act with all which that entails (*De Wet NO v Jurgens*, *supra,* at 48A-C). (Section 17(4)(b) of the Matrimonial Property Act now requires both spouses to be cited in an application for the sequestration of a joint estate.) Moreover, the Insolvency Act does not recognise separate estates of a debtor, nor does it allow for the sequestration of only part of a debtor's estate. An order of sequestration has the effect of divesting the debtor of the whole of his or her estate. Section 20(1)(a) provides expressly that the effect of the sequestration of the estate of an insolvent shall be 'to divest the insolvent of his estate and to vest it in the Master until a trustee has been appointed, and, upon the appointment of a

trustee, to vest the estate in him.' Section 20(2) in turn provides that for the purposes of subsection (1) the estate of an insolvent shall include:

> '(a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment;
>
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.'

[7] There is no provision, then, for only part of a debtor's estate to be available to his or her creditors, nor, when incurring a debt, is a debtor capable in law of binding only part of his or her estate for its recovery. When the estate is sequestrated for recovery of the joint debts of the spouses, both spouses become 'insolvent debtors' for purposes of the Insolvency Act, with the consequence that the property of both of them (comprising their undivided interests in the joint estate as well as separately owned property) is available to meet the claims of creditors. In my view that follows

inevitably from the joint liability of the spouses for debts that are incurred by either of them, and the ordinary legal consequences to a debtor of having incurred debt. Neither one of the spouses, nor a testator, is capable in law of unilaterally altering those ordinary consequences. A spouse who is married in community of property, and who owns separate property, is in no stronger position than any other debtor who similarly is not capable in law of immunising property against the claims of creditors. (cf *Ex parte Estate Kelly* 1942 OPD 265.

[8] We were referred to two decisions in which a contrary conclusion was reached. In *Ex parte Oberholzer* 1967 (1) PH C7 (GW) it was held that a donor or testator is entitled to give or bequeath immovable property to a woman who is married in community of property so as not to form part of the joint estate, and not to be subject to the marital power of her husband,

'with the result that in the event of the insolvency of her husband, it will not form part of the insolvent joint estate.' It would be superfluous to repeat the very full analysis by McLaren J in *Badenhorst's* case of the authorities that were relied upon in that case: it is sufficient to say that I agree with his conclusion that those authorities do not provide cogent support for the conclusion that was reached. In *Van Wyk v Groch en Andere* 1968 (3) SA 240 (E) it was held that the separate property of a woman who was married in community of property was immune from attachment in satisfaction of a judgment obtained against her husband. The *ratio* of that decision was expressed as follows at 242C-D:

> ' Daar kan geen beginselrede bestaan waarom die uitsluiting van 'n man se maritale mag, ten aansien van spesifieke bemaakte eiendom deur 'n testateur, nie die eggenote ingelyks beveilig met betrekking tot sodanige eiendom nie. Hieruit volg dit, na my mening, dat die afsonderlike eiendom van 'n getroude vrou ten opsigte waarvan die maritale mag uitgesluit is, onvatbaar is vir beslaglegging deur 'n skuldeiser van die man.'

If the judgment debt that was in issue in that case was incurred by the husband as administrator of the joint estate (there is nothing in the judgment to suggest that it was not) then in my view the decision was unsound. As was the decision in *Oberholzer's* case, and for the same reason. Both courts appear to have overlooked the fact that the debt in issue was not the debt merely of the husband but was a joint debt of the spouses. The separate property of the wife was not in truth being sought in satisfaction of the debt of her husband (as was suggested in *Van Wyk's* case at 242D and in *Oberholzer's* case) but was being sought to satisfy her own debt, albeit that it was incurred by her husband in his capacity as administrator of the joint estate. In neither case were any cogent reasons proffered for why the separate property was protected against what were in law the wife's own creditors.

[9] The appellant also submitted that the Matrimonial Property Act has had the effect of creating a separate estate comprising all property that is excluded from the joint estate, and that that estate is protected against the incursions of joint creditors of the spouses. The result, according to that submission, is that each estate (i.e. the joint estate and the separate estate) is capable of having its own discrete creditors. There are indeed various provisions of the Act that give recognition to the separate property of spouses who are married in community of property (see sections 17, 18, 19 and the definition of 'separate property') but I do not think that implies the creation of a novel entity that is capable of incurring discrete debts, or that is protected from the normal consequences of the spouses' indebtedness. Indeed, the existence of such an entity would give rise to startling anomalies for it would suggest that a debtor might be insolvent in relation to one estate and not insolvent in relation to the other. I do not think that the Act has

brought about that result. It recognises the existence of separate property in the relationship between the spouses *inter se* but I do not think it affects the rights of third parties. For so long as a spouse is a debtor in my view his or her creditors may look to all the property of the debtor in satisfaction of the debt and similarly upon insolvency all the debtor's property is available to his or her creditors. In those circumstances I agree with the conclusion that was reached in *Badenhorst's* case and in the Court *a quo.*

The appeal is dismissed with costs.

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R NUGENT

JUDGE OF APPEAL

HARMS JA)

CAMERON JA)

BRAND JA)

HEHER AJA) CONCUR