IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: 3348/2019

In the matter between:

J[….] A[….] **Applicant**

and

R[….] A[….] **Respondent**

HEARD ON: 03 FEBRUARY 2022

JUDGMENT BY: MATSHAYA, AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLII on 25 February 2022. The date and time for hand-down is deemed to be the 28 February 2022 at 9h30.

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[1] The applicant was granted interim relief by this court on 10 November 2021 suspending the execution of a warrant of execution (the writ) that was granted by the Registrar of this court on 25 October 2021 against him in favour of the

respondent. He now seeks the setting aside of the said writ with costs. The application is opposed by the respondent.

[2] The applicant is an adult male person residing at no.[….], Bloemfontein. The respondent is an adult female person residing at no.[….], Bloemfontein.

[3] Their marriage to each other was dissolved by an order of this court on 4 June 2020. There was a divorce settlement agreement that was signed by the parties which was subsequently made an order of court, amongst other clauses, their immovable property (the property) would be sold in the open market and proceeds shared in a particular manner. I deliberately omit to mention the manner of sharing because it seems from the pleadings to be a cause of disagreement of which I am not called upon to venture into in these proceedings.

[4] The property was subsequently sold and there was net profit of R404 935.22 of which the applicant contends is entitled to his equal half share thereof for R202 467.61. It appears from the pleadings that the respondent resists the applicant's entitlement to the said share that is still held in the trust account of Symington and De Kock who acted as the transferring attorneys for the property.

[5] Subsequent to the parties' dispute pertaining to the net profit of the sale of the property, Symington and De Kock filed interpleader proceedings (the inter pleader proceedings) in the regional court in an attempt to resolve the dispute. The matter was dismissed on the basis of lack of jurisdiction on that court. Thereafter, the applicant did not take any steps to assert his perceived rights to the remaining half share until the respondent obtained the writ from the registrar to enforce her alleged rights to the remaining half of the net proceeds that are still held in the trust account of Symington and De Kock. The applicant

lodged this application in the main, to set aside the writ as he is of the view that there was no legal basis for the said writ.

[6] It is not in dispute that the parties were married to each other and the said marriage was dissolved by an order of this court through a decree of divorce that incorporated a deed of settlement. It is also common cause that the respondent has already claimed one half share of the net proceeds from Symington and De Kock. It is also not in dispute that the remaining half of the net profit generated from the sale of the property is still held in the trust account of Symington and De Kock.

[7] The genesis of the dispute between the parties is the interpretation of clause 4.2 and 4.2.4 (the impugned clauses) of the deed of settlement that was incorporated into the decree of divorce. The applicant is of the view that he is entitled to the half share of the net profit from the sale of the property whereas the respondent is of the view that she is entitled to the whole profit.

[8] Further, the applicant is of the view that there is a dispute pertaining to the interpretation of the impugned clauses of the Deed of Settlement and therefore, the respondent should not have acquired the writ until the dispute has been resolved. He submitted that the respondent herself acknowledged the said dispute during the inter pleader proceedings. In essence, the applicant submitted that there is no judgment debt and therefore no basis for the issuing of the writ.

[9] The respondent denies that there is a dispute regarding the impugned clauses. She is if the view that the writ was lawfully issued and there is no basis for it to be set aside. She also submitted that there is no pending legal dispute challenging the legality or validity of the writ to warrant it to be set aside.

[10] I pause to reiterate that these proceedings are not meant to adjudicate the point of dispute regarding the interpretation of the impugned clauses but whether the applicant has made out a good case for the writ to be set aside.

[11] **Uniform Rule**[1] **45(1)** provides that:

"*A judgment creditor may, at his or her own risk, sue out of the office of the registrar one or more writs for execution thereof* …."

[12] A writ may be set aside on, *inter alia*, the following grounds:

> "*(a)*
> *(b)*
> *(c) Where the amount payable under the judgment can be ascertained only after deciding a further legal problem*."[2]

[13] It is trite that there must be certainty as to what the creditor is entitled to under the judgment, and a writ may be set aside if the judgment in respect of which it had been issued is not definite and certain,[3] or if it is no longer supported by its *causa*.[4]

[14] At first, counsel for the applicant sought to suggest that a settlement agreement that was made an order of court is not a judgment debt for purposes of Uniform Rule 45(1). When engaged by the court on this aspect, she reneged from that submission. That was a noble concession because it is settled law that a deed of settlement that has been made an order of court is a judgment debt. Instead, she then submitted that the deed of settlement did not entitle the respondent to the amount under whose pretext the writ was issued.

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[1] Uniform Rules of Court.
[2] Erasmus: Superior Court Practise, D1-604-5.
[3] See De Crespigny v De Crespigny 1959 (1) SA 149 (N); Ras v Sand River Citrus Estates (Pty) Ltd 1972 (4) SA 504 (T) at 510E; Le Roux v Yskor Landgoed (Edms) Bpk 1984 (4) SA 252 (T) at 257G and Van Dyk v Du Toit 1993 (2) SA 781 (O) at 783D.
[4] See Ras v Sand River Citrus Estates (Pty) Ltd, supra, at 510A-E; and Van Dyk v Du Toit, supra, at 783C.

[15] The respondent argued that the applicant sat back and did not do anything to assert his alleged rights to the remaining half share of the net profit that is still held in trust. The pleadings confirm this submission. This created a difficulty because there were no legal proceedings instituted by any of the parties particularly the applicant, to resolve the dispute pertaining to the impugned clauses. This was not an ideal situation.

[16] It is trite that the registrar is empowered in law to issue a writ.[5] It is also apparent from the pleadings that the amount of the 'judgment debt' was easily ascertainable. As indicated earlier, the genesis of this dispute pertains to the interpretation of the impugned clauses.

[17] The significance of this is that the underlying right of the respective parties' entitlement to the remaining half share of the net proceeds is challenged. To put the matter differently, according to the applicant, the respondent's underlying right to the 'judgment debt' is not ascertainable. To advance his case, the applicant referred to paragraph 6.3 of the respondent's founding affidavit of the inter pleader proceedings suggesting that the respondent acknowledged the dispute. The respondent disagreed to that submission. The said paragraph ought to be viewed in context. Upon a careful look at it, it seems those averments were made in the alternative. Therefore, they cannot be viewed as acknowledgement by the respondent of the need for rectification of the impugned clauses.

[18] From the pleadings, the dispute pertaining to the correct interpretation of the impugned clauses is glaring. The fact that there were inter pleader proceedings in the regional court support my view that there is a dispute pertaining to the parties' underlying right to the amount in question. Inevitably, this also renders questionable the underlying *causa* on which the writ was issued. Furthermore, in paragraph 4.5 of the respondent's affidavit in the inter pleader proceedings acknowledged the existence of the said dispute. Therefore, she should not

[5] Uniform Rule 45(1), supra.

have caused the Registrar to issue a writ pending the resolution of the dispute pertaining to their perceived right to this amount, respectively. It was premature of her to do so. Clearly, the amount payable to the respective parties, whether equal half or the whole net profit to the respondent, can only be ascertained after adjudication of a certain legal problem pertaining to the impugned clauses. I cannot be prescriptive to the parties on the form such proceedings should take whether they be declaratory or rectification proceedings as that discretion rests with them.

CONCLUSION

[19] It is clear that the underpinning right of the respondent to the remaining half share of the net profit is seriously challenged by the applicant even though the applicant regrettably, has not taken steps to assert his perceived rights thereto. Therefore, the respondent should not have caused the Registrar to issue the writ pending the determination of the further legal problem. The writ ought to be set aside.

COSTS

[20] Costs are generally in the discretion of the court. Ordinarily, they follow the successful party. I am not convinced that the applicant has made out a case for punitive costs and that prayer cannot succeed.

ORDER

[21] The application for the setting aside of the warrant of execution is granted with costs.

MATSHAYA AJ

Appearances:

For the Applicant : Adv. Ferreira
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Waverley, Bloemfontein

For the Respondent: Adv. Van der Merwe
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