REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) NOT REPORTABLE
(2) NOT OF INTEREST TO OTHER JUDGES
(3) REVISED.

CASE **NO: 4081/2013**

12/6/2017

In the matter between:

M S R	**APPLICANT**
and	
K K T	**FIRST RESPONDENT**
THE SHERIFF	**SECOND RESPONDENT**

JUDGMENT

KUBUSHIJ

[1] In a divorce decree ending the marriage between the applicant and the first respondent the applicant was ordered to pay rehabilitative maintenance to the first respondent in the amount of R30 000 *per* month. It seems like the applicant fell in arrears with some of the payments which resulted in the first

respondent invoking the provisions of uniform rule 45 (8) attaching an amount of R32 500 of the applicant's funds deposited in a Standard Bank account. The amount was, as a result of the attachment, removed by Standard Bank from the applicant's account. Apparently, a further amount of R5 795, 68 was also later removed by Standard Bank from the applicant's account.

[2] The applicant has as a result approached this court on an urgent basis for the return of the said funds together with some ancillary relief. In response to the applicant's relief for the return of the attached funds, the first respondent contends that Standard Bank has not paid over the funds attached either to the second respondent or to her. This is not disputed by the applicant.

[3] Only the first respondent is opposing the application and has raised several objections, in particular that the applicant should have joined Standard Bank as a respondent in this application. For the reasons that will come out later, this is the defence I intend to deal with in this judgment as it is dispositive of the issues before me.

[4] It is the first respondent's submission that Standard Bank has a direct and substantial interest in the matter and should have been joined as a respondent in these proceedings. According to the first respondent, since the funds are still with Standard Bank it is vital and necessary that Standard Bank is joined in these proceedings if indeed the applicant seeks to recover the attached funds.

[5] However, according to the applicant, Standard Bank is not a necessary party to the proceedings. The submission is that Standard Bank is merely a deposit holder and does not have interest in the funds deposited by the applicant in his account. The funds belong at all times to the applicant and are withdrawn by the applicant at will and without notice to the bank. There are no interests of Standard Bank and/or obligations that will be affected by the judgment, so it is argued. I was in this regard referred to a judgment in *Rosebank Mall (Pty) Ltd v Cradock Heights (Pty) Ltd.*[1] The following is stated at para 11 thereof:

> "[11] It is important to distinguish between necessary joinder (where the failure to join a party amounts to a non-joinder), on the one hand, and

[1] **2004 (2) SA 353 (WLD).**

joinder as a matter of convenience (where the joinder of a party is permissible and would not give rise to misjoinder), on the other hand."

[6] The question as to whether all necessary parties had been joined does not depend upon the nature of the subject matter of the suit, but upon the manner in which, and the extent to which, the court's order may affect the interests of third parties. The test is whether or not a party has a direct and substantial interest in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.[2]

[7] It is not in dispute that at the time the matter was argued the funds complained of were not in the applicant's account. It is also common cause that the said funds were removed from the applicant's account by Standard Bank after it was served with a notice of attachment by the second respondent. The said funds have not been transferred to the second respondent as required in terms of uniform rule 45 (8). Hence, the evidence is that the attachment has not been completed. It is, thus, safe to infer that the funds are in the possession of Standard Bank. If it is to be accepted that the attached funds are still in the possession of Standard Bank it means that Standard Bank is a necessary party to these proceedings.

[8] There is no evidence before me that Standard Bank was served with the application before me or that it is aware of these proceedings. As such, it can be assumed, safely so, that Standard Bank is not aware of these proceedings. I can, as well, infer that since the attachment was still in process, not yet complete, that it is possible that, as I write this judgment, the process has been completed by Standard Bank transferring the funds to the second respondent.

[9] During argument, the applicant applied for the amendment of his prayers as set out in his notice of motion. Prayer 2 of the notice of motion, that requires the first and second respondents to return the funds removed from the applicant's

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[2] See *Erasmus : Superior Court Practice Volume 2* at Dl-124 to Dl -1 25.

Standard Bank account, is to be struck out and replaced by a new prayer that will be included under prayer 4 for 'further and alternative' relief. The new prayer is for setting the writ of attachment aside. The first respondent is opposing the amendment and I have not ruled on it. To my mind, the amendment even if it can be allowed will not cure the applicant's challenges, mainly because on the evidence before me, the funds are still in Standard Bank's possession.

[10] The submission by the applicant that if the writ is set aside Standard Bank will be able to return the funds to the applicant's account does not hold water. The applicant appears to lose sight of the fact that when the funds were attached, Standard Bank was a party to the proceedings. It was cited as a Garnishee. Standard Bank was able on the strength of the notice of attachment to remove the applicant's funds from his account. Similarly, it must be on the strength of a court order citing Standard Bank as a party that Standard Bank will return the funds back into the applicant's account. If Standard Bank is not cited in these proceedings there will be nothing compelling it to return the funds to the applicant's account.

[11] From the aforesaid, it is undoubtedly clear that Standard Bank is a necessary party and has an indubitable direct and material interest in this matter. It ought to have been joined in the proceedings.

[12] The first respondent prays for the dismissal of the application in case of non- joinder. I do not think that the application should be dismissed but, in the interest of justice, be struck from the roll and the applicant be given an opportunity to join Standard Bank.

[13] The first respondent is entitled to costs. I do not intend to order punitive costs as prayed for by the first respondent.

[14] I make the following order -

1. The application is struck from the roll with costs.
2. The applicant is granted leave, after effecting joinder of Standard Bank in the application and supplementing his papers as he may be advised, to seek the relief sought in his notice of motion.

E.M. KUBUSHI

JUDGE OF THE HIGH COURT

APPEARANCES

For Applicant	: **Ms L. Mbajwa**
Instructed by	: **L. Mbanjwa Incorporated**
For the 2nd Respondents	: **N Voyi**
Instructed by	: **Ndumiso Voyi Incorporated**
Date heard	: **25 April 2017**
Date of Judgment	: **12 June 2017**