

SOUTH AFRICA / JUDGMENT

B.B v J.S.B (607/2014) [2014] ZAECPEHC 33 (29 May 2014) [2014] ZAECPEHC 33

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

607/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL

DIVISION, PORT ELIZABETH

CASE NO.:

607/2014

DATE HEARD: 22

MAY 2014

DATE DELIVERED: 29 MAY

2014

In

the matter between:

B.
B.
Applicant
and
J.S.
B.
Respondent

JUDGMENT

EKSTEEN J:

- [1] This is the return day of a rule nisi obtained by the applicant on an urgent basis, ex parte and, it would appear, in chambers. The application is now opposed and both answering and replying affidavits have been filed.

Background

- [2] The parties were married to one another out of community of property during [.....], which marriage still subsists. Marital difficulties have, however, arisen and the applicant has issued summons in which she claims a decree of divorce and certain ancillary relief, including a redistribution of the assets of the parties pursuant to the provisions of section 7(3) of the Divorce Act, 70 of 1979, to the extent of 50% of the estate of the respondent.
- [3] Prior to the commencement of the divorce action the respondent had sold his farm, De Hoek, in the district of Prieska for an amount of R12 million and registration of transfer is pending. The applicant contends that if the purchase price is paid to the respondent there is a strong probability that he may dissipate or secrete away the money thereby frustrating her claim in terms of section 7(3) of the Divorce Act. She has therefore launched the present proceedings and on 25 February 2014 obtained a rule nisi calling upon the respondent to show cause why an order should not be made:

“2.1 That, pending the finalisation of the divorce action instituted by the applicant, 50% of the net proceeds of the sale of the farm De Hoek be and is hereby held in trust, in an interest bearing (section 78(2)(a) account), by the Respondent’s transferring attorneys, Messrs M and M Van Niekerk Attorneys (Van Niekerk Inc. M and M), Mr Frans Lotz;

2.2 That the costs of this application be reserved for decision at the hearing of the divorce action, save in the event of the Respondent opposing the relief sought, in which event he pay the costs thereof.

2.3 That prior service of the application on the respondent be dispensed with.”

Moreover, the applicant obtained an interim interdict pending the return day of the rule nisi in accordance with paragraph 2.1 of the order set out above.

Procedure

- [4] It is appropriate, before I turn to the merits of the application, to consider the procedure which has been adopted in the present matter. I have recorded earlier that the application was initially brought on an urgent basis, ex parte and in chambers.

- [5] In her founding affidavit the applicant alleges that she has no control over, nor any means of knowing what the respondent intends doing with the proceeds of the sale of the farm De Hoek. Later in seeking to make the case for urgency and for the matter to be heard *ex parte* she states as follows:

“It is further respectfully submitted that this matter is of sufficient urgency to warrant the abridgement of the time limits provided for in the Rules of this Honourable Court. I have been advised that the transfer of the property is immediately to take place, if same has not already taken place. When that happens the funds will be paid over to the Respondent and he will be at liberty to deal therewith as he sees fit. If the application is brought in the normal course the harm that this application seeks to prevent will have long since occurred.

In the event of the Respondent (being) given advance warning of this application the harm that this application seeks to prevent will in all likelihood occur as he will be forewarned. I would accordingly respectfully pray that prior service on him of this application be dispensed with.”

- [6] The averment that “transfer of the property is immediately to take place, if same has not already taken place” is of course hearsay. As a general rule, subject to the provisions of the Law of Evidence Amendment Act, 1998, hearsay evidence is not permitted in affidavits. No case has been made out for the admission of this hearsay averment in terms of the provisions of section 3(1)(a) or (b) of the Law of Evidence Amendment Act. The court does, however, retain a discretion under section

3(1)(c). It is true that in urgent applications courts have permitted a deponent to state that “he is informed and verily believes” certain facts relied upon to be true and correct. (See for example *Galp v Tansley NO and Another* 1966 (4) SA 555 (C) at 558H-559A; *Johnstone v Wildlife Utilisation Services (Pvt) Limited* 1966

(4) SA 685 (R); *Steyn v Schabert en ‘n andere* NNO 1979

- (1) SA 694 (O) at 699G-H.) Where this has been permitted to occur the applicant has been required to set out in full the facts

upon which the grounds for the belief are based and how the information was obtained (see for example *Geanotes v Geanotes* 1947 (2) SA 512 (C); *Mall (Cape) (Pty) Ltd v Merino Ko-operasie Beperk* 1957 (2) SA 347 (C) at 353). The source of the information must be disclosed with a degree of particularity sufficient to enable the opposing

party to make independent investigations, including, if necessary, verification of the statement from the source itself (see for example *Southern Pride Foods (Pty) Ltd v Mohidien* 1982 (3) SA 1068 (C) at 1072).

- [7] In the present instance the applicant does not state that she verily believes in the truth of the statement nor does she set out any grounds upon which such belief could be based. She does not disclose the source of the information and no verifying affidavit is filed. In these circumstances the averment that transfer of the property is immediately to take place, if it has not already taken place, is inadmissible. In the absence of this averment no case for urgency has been made at all.
- [8] Even if the application was urgent enough to dispense with the normal time periods, and for present purposes I shall assume, notwithstanding my earlier finding, that it is, the question arises whether it was proper to move the application ex parte. The applicant's fear, as articulated in her founding affidavit, which I have earlier quoted, is that when transfer does occur in the future the funds will be paid over to the respondent and he will be at liberty to deal therewith as he sees fit. He is not yet in possession of the funds. That this is the true state of affairs is borne out by the answering affidavit. In these circumstances the harm which the application intends to avert, namely the dissipation or secretion of the funds could not have occurred as the respondent had not received the money.
- [9] In *Knox D'Arcy Limited and Others v Jamieson and Others* 1994
- (3) SA 700 (W) at 707J-708A Stegmann J stated:

"The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant

having had any opportunity of been heard, is grossly undesirable and contrary to the fundamental principles of justice. It can lead to serious abuses and oppressive orders which may prejudice an intended defendant in various ways, including some ways that may not be foreseeable."

- [10] In an appeal to the Supreme Court of Appeal (the Appellant Division of the Supreme Court as it then was) in the same matter (reported in [1996] ZASCA 58; 1996 (4) SA 348 (AD)) Grosskopf JA expressed his unreserved agreement with the aforestated passage and added that whilst there may be circumstances in which an application of this nature may be heard in camera without notice "this should happen only in very clear cases where justice cannot be served otherwise than by depriving the respondent of his right to be heard." He proceeded to record his view that such cases would be exceptional.
- [11] The present case is not, in my view, such an exceptional case. On the papers there is no suggestion that the proceeds of the sale have been paid over to the respondent or that he had control over the funds. On the contrary, as I have stated earlier, it is the applicant's case that when transfer occurs the funds "will be paid over" and the respondent "will be at liberty" to deal therewith. It is therefore inconceivable that any prejudice might have flowed from service upon

the respondent prior to the application being moved thereby affording him the opportunity to be heard. The granting of the interim order was clearly one which affected the respondent's rights. It is difficult to understand how counsel of considerable seniority, who moved the initial application, could have sought an order in the absence of prior service of the application on the respondent. I shall revert to this issue when addressing the costs of the application.

The merits of the application

[12] The circumstances giving rise to the application are set out at the commencement of this judgment. The applicant seeks an interdict pendente lite in the terms set out in the rule nisi which I have quoted earlier herein. Mr Mullins, who appeared on behalf of the applicant, acknowledges that the application is in the nature of what has become commonly known as an anti-dissipation order. In *Knox D'Arcy Limited and Others v Jamieson and Others*

[1996] ZASCA 58; 1996 (4) SA 348 (AD) at 372G-I Grosskopf JA commented on the nature of this kind of application as follows:

"The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, ie that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency."

[13] It has, I think, been universally accepted since the judgment in *Knox D'Arcy* that this passage correctly sets out the legal requirement for an interdict of this kind. The applicant must accordingly show a particular state of mind on the part of the respondent being that he is getting rid of funds, or is likely to do so, with the intention of defeating the claims of creditors.

[14] An interim interdict may of course be granted where the averments made by the applicant, together with those averments made by the respondent which the applicant cannot dispute, justifies the granting of the relief. In order to succeed, however, the applicant must make out a case in her founding papers and she must set out facts necessary to establish a prima facie case in as complete a way as the circumstances demand. An applicant cannot in reply attempt to cure a deficient case, or fortify one inadequately set forth, by the introduction of new matter. (See *Riddle v Riddle* 1956 (2) SA 739 (C) at 747 -748 and *Van Aswegen v Pienaar* 1967 (1) SA 571 (O).) Where an application is brought ex parte the utmost good faith is expected on the part of the applicant in disclosing all relevant facts that the court may need in coming to a decision. It requires that the applicant also set out those facts known to her

which may militate against the granting of the relief. This is so because the respondent is being deprived of the opportunity to be heard.

- [15] The facts which the applicant is required to set out in her founding affidavit must be primary facts and not merely secondary

facts.

Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponents own conclusions. (See Harms: Civil Procedure in the Supreme Court; Commentary on the Uniform Rules B47; and Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others 2003

- (1) All SA 164 (C) para [28].)

- [16] The applicant's founding affidavit is astonishingly brief for an application of this nature and runs in its totality to approximately four pages. The material portions of the applicant's affidavit, for purposes of the adjudication of the present application may readily be set out in full herein.

- [17] She states that:

"... throughout the marriage, and particularly recently, the Respondent has informed me that if I ever left him he would make sure that I received absolutely nothing. Having regard to the manner in which the Respondent has conducted his affairs during the marriage I have no reason to doubt that this is his intention;"

- [18] Later she proceeds to state that:

"once the Divorce Summons is served on the Respondent I have no doubt whatsoever that he will ensure that the proceeds are either dissipated or placed beyond my reach, thus severely prejudicing my claim for a redistribution in due course.

I should add that the Respondent is an extremely wealthy man. Apart from the farm referred to above he owns another farm, Westering (which I believe is registered in the name of a trust), and has other substantial assets, the details of which are not known to me. I, on the other hand, have no assets other than personal effects."

- [19] That, essentially, is the applicant's case. I turn then to consider these averments in the context of the respondent's

answer thereto.

- [20] The statement made by the applicant in her founding affidavit in respect of the respondent's alleged threat to ensure that she would get nothing is no more than a bald averment and no reference is made either in her founding affidavit or in her replying affidavit to any instance or occasion where a communication of this nature was made. A bald allegation of this

nature is made at the applicant's peril precisely because she is not usually permitted to set out a more complete case in reply. The respondent denies the allegation. It is true that it is a bare denial, however, by virtue of the vague and unexplained allegation contained in the founding papers it does not seem to me that there is any other way open to the respondent to deal with the allegation and nothing more can be expected of him in this instance.

- [21] The ensuing averment relating to the manner in which the respondent has conducted his affairs during the marriage remains entirely

unexplained and unsubstantiated. Not a single averment is contained in the founding affidavit as to the manner in which the

respondent had conducted his affairs and in fact it is the applicant's contention in reply that she has no knowledge of the respondent's business and financial matters. This averment, whilst being difficult to comprehend in the absence of some explanation, is, at best, no more than the applicant's own opinion and no primary facts have been alleged from which it may be concluded that the manner in which the respondent conducted his affairs is indicative thereof that he may dissipate or secrete his assets away. In these circumstances it is impossible for the respondent to have dealt meaningfully with this allegation in reply and I think that this statement may safely be discounted.

- [22] By parity of reasoning the assertion that the respondent will ensure that the proceeds of the sale of the farm are either dissipated or placed beyond the reach of the applicant may also be ignored. It is totally unsupported by primary facts.

- [23] In answer, however, the respondent does not deny that he intends to distribute virtually the entire proceeds of the sale of the farm De Hoek to bona fide creditors. He sets out in some considerable detail debts which he is required to pay to creditors, supported in each case, to varying degrees, by recent invoices and correspondence and he asserts that the applicant's claim in terms of section 7(3) of the Divorce Act can never be prejudiced by his honouring his obligation to pay his respective bona fide creditors. The applicant, in her replying affidavit, speculatively questions the validity of many of these debts however,

she is not in a position to dispute the existence of any one of these debts on any factual basis. I think accordingly that the respondent's allegations in respect of the existence of these debts must be accepted.

- [24] It is significant, I think, that the applicant has not shown or alleged any single act from which it could be inferred that the respondent has reduced his patrimony with the intent of frustrating the applicant's claim. The case is founded on her averment that he is likely to do so. The payments of the existing debts to which the respondent refers cannot, in my view, be said to be mala fide. (Compare *Knox D'Arcy Limited* 1996 (4), supra at 372H-I and p. 377A-D.)

- [25] This brings me to the final leg of the applicant's case. She seeks to suggest that the respondent is possessed of sufficient means to fund his lifestyle and business and to settle his debts from other sources. She states that the respondent is an extremely wealthy man.

This too is merely a secondary fact, or the applicant's own opinion which is not supported by any primary facts of the kind which the applicant is required to set out in her founding affidavit in order to enable a court to determine the reliability of the conclusion for which she contends. The respondent for his part, denies the averment. I do not think that I can conclude from the mere say so of the applicant that the respondent is possessed of any significant wealth from which he were able to pay the debts which he contends for other than the proceeds of the farm De Hoek.

- [26] I do not lose sight of the applicant's allegation that the respondent "owns another farm, Westering" which she acknowledges is registered in the name of a trust. The respondent does not dispute that the farm Westering is owned by a trust in respect of which he is a trustee and a beneficiary. The applicant too is a trustee and a beneficiary in the trust.

Trust assets, are however administered separately from the assets of the trustees and the respondent would not be entitled to utilise the assets held in the trust. (See section 11 and 12 of the Trust Property Control Act, 57 of 1988.) The respondent would not be entitled, as a matter of law, to pay his personal debts from assets which he holds in trust. Similarly, the trust assets would not be considered for purposes of the applicant's claim in terms of section 7(3) of the Divorce Act unless it can be shown that the respondent controlled the Trust and that, but for the Trust, he would have acquired and owned the assets held in trust in his own name (see *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA)). No averments are made in the founding papers in respect of the respondent's administration of the trust which would render them vulnerable to a claim in terms of the provisions of section 7(3).

- [27] In her replying affidavit the applicant, recognising the difficulty which flows from the manner in which the founding papers were drawn, states that the respondent has throughout the marriage treated the Westering family trust as his alter ego making no distinction between his personal affairs and those of the trust. Three difficulties arise from this averment. Firstly, the applicant cannot seek to make her case in reply. These averments ought to have been contained in the founding papers. The second difficulty which flows from this belated averment is that it is directly in conflict with her earlier protestation to which I have alluded above that she has no knowledge of the respondent's business and financial matters. The third difficulty is that this bald allegation is, once again, no more than the applicant's conclusion. No primary facts are alleged to support the conclusion. On the averments set out in the papers it cannot be held that the assets of the trust may be used to settle the respondent's debts nor that they are vulnerable to the applicant's claim in terms of the provisions of section 7(3).

[28] In conclusion, the applicant declares that the respondent is possessed of substantial assets, the details of which are not known to her. This is a non sequitur. If she has no knowledge of the details of the assets then how, one might rightly ask, can she state that such assets exist or belong to respondent. In any event this too is no more than the applicant's perception and no primary facts are set out in the founding affidavit on which it could be held that such a case is made. Moreover, the respondent in his answering affidavit denies the assertion.

[29] All things considered, it seems to me that the only factual averment made in support of the claim that respondent will dissipate or secrete funds is that he said that he would ensure that she receives nothing. This, I have earlier recorded, is disputed. In the Knox D'Arcy appeal case, *supra*, there was some argument as to whether the fact that assets were likely to be secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probability or merely *prima facie*. Grosskopf JA held at 373G-H

"... it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted."

[30] In the present matter the applicant's proof is very weak indeed. The single factual averment to which I referred earlier stands in isolation from any supporting evidence of where, when or under what circumstances the alleged threats were made. No allegations are made of any conduct on the part of the respondent which may be indicative of his intent to carry out his threat and no *mala fide* act on his part has been alleged.

[31] In all the circumstances I consider that the applicant has failed to make out a case on the papers that the respondent is getting rid of funds or is likely to do so with the intention of defeating her claim in terms of section 7(3) of the Divorce Act. In the result the rule must be discharged.

Costs

[32] Ms Z., who appears on behalf of the respondent has urged me to order that the applicant should pay the respondent's costs on a scale as between attorney and client by virtue of the procedure which was adopted in bringing the application urgently and *ex parte* on the allegations made. I have given careful consideration to the submissions made by counsel on both sides. I have concluded that in this instance the conduct of the applicant in seeking and obtaining the interim interdict as a matter of urgency

and *ex parte* is indeed worthy of censure and justifies such an order.

[33] In the result, I make the following order:

1. The rule is discharged.
2. The applicant is ordered to pay the respondent's costs on a scale as between attorney and client.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv N Mullins instructed by Gregory Clark & Associates, Port Elizabeth

For Respondent: Adv T Zietsman instructed by Schoeman Oosthuizen Inc, Port Elizabeth

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