

SOUTH AFRICA / JUDGMENT

H M v A M (2708/2020) [2020] ZAFSHC 162 (10 September 2020) [2020] ZAFSHC 162

COURT

Free State High Court, Bloemfontein

BEFORE

DAFFUE

CASE / FILE NUMBER

2708/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2708/2020

In the matter between:

HLC M Applicant and A M Respondent

CORAM: DAFFUE, J

HEARD ON: 10 SEPTEMBER 2020

DELIVERED ON: 10 SEPTEMBER 2020

- [1] The applicant and the respondent in this application are married to each other out of community of property with the inclusion of the accrual system. There are pending divorce proceedings in the Regional Court, Bethlehem. Applicant as plaintiff instituted a divorce action against respondent on 31 March 2020.
- [2] It is uncertain what the status of the litigation in the Regional Court is and what exactly is claimed by applicant and, in the event that a counterclaim has been filed, what orders are sought by respondent.
- [3] It is accepted that in the divorce proceedings applicant inter alia seeks an order in accordance with the provisions of s 3 of the Matrimonial Property Act[1] (the “MPA”) which reads as follows:

“(1) At the dissolution of a marriage subject to the accrual system, by divorce or by death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse, or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.

[2] Subject to the provisions of s 8(1), a claim in terms of ss (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.”

[4] The parties are beneficiaries in five different asset-owning trusts. These are not in contention at this stage of the proceedings.

[5] Applicant now seeks the following interim relief with immediate effect pending the finalisation of the divorce action:

“2.1 That the respondent be and is hereby interdicted and restrained from in any manner or fashion disposing of and/or alienating and/or encumbering the following assets:

2.1.1 the immovable property situated at, Bethlehem, Free State;

2.1.2 the amount of R400 000-00 for trading in crypto currency; and

2.1.3 all other movable assets generated in marriage according to the accrual system.

2.2 That the respondent is ordered and directed to pay the costs hereof on an attorney and client scale.”

[6] The applicant is a director at a petroleum company while the respondent is presently unemployed as is apparent from paragraph 20 of the founding affidavit, the answering affidavit and whatsapp messages attached to the replying affidavit.

[7] The application was triggered by an advertisement placed on the internet by Property24, evidencing that the immovable property

mentioned in the notice of motion and registered in the name of the respondent was up for sale. According to respondent this

property was on the market for three months, but he did not receive any offer during that time. The sole mandate of the estate

agent was terminated and the property taken off the market upon receipt of a letter of demand by applicant's attorneys dated 1 July 2020. This is apparent from the answering affidavit and the letter of the respondent's attorney dated 8 July 2020. Notwithstanding receipt of this letter applicant deposed to her founding affidavit on 14 July 2020 where after the application was issued on 24 July 2020. In paragraph 19 of the founding affidavit it is alleged that no response was received in respect of the undertaking sought. This is not correct as is evident from the letter dated 30 July 2020 and the confirmatory affidavit of the respondent's attorney.

- [8] Applicant brought the application on an urgent basis and three allegations are particularly relied upon in this regard and I quote from the founding affidavit:

“17. The respondent is not a man of excessive wealth and when the proceeds of a sale and the crypto currency investment are dissipated, I will have no means by which to recover any accrual to which I will be entitled.

20. The respondent sits at home all day and has no means of income, and it is my understanding that he wants to sell the assets without my knowledge or agreement of same and utilise the proceeds of the assets on which to live.
21. Once this is achieved, all is lost and I will not be in a position to recover earmarked accrual funds.”
- [9] In terms of s 4 of the MPA the net values of the accruals of the estates of spouses are determined at the dissolution of the

marriage. Any doubt as to the relevant date of calculation has been removed by the Supreme Court of Appeal in AB v JB.[2]

- [10] Applicant failed to place any evidence whatsoever before the court pertaining to the net values of the accruals of the estates of the parties at this stage. Obviously the divorce court will have to determine the net values at the dissolution of the marriage, but in order to show that she is entitled to interim relief, applicant should have placed evidence before the court indicating that her estate has shown, either no accrual, or less than that of the respondent. Applicant failed to set out her assets and liabilities and the growth of her estate from inception of the marriage to date hereof. Although it is common cause that respondent is the owner of the aforesaid immovable property,

applicant failed to show the value of the property, the date of purchase and the purchase price thereof in order to determine any

increase in the value of the property. The property may even have decreased in value bearing in mind the present economic

climate. More importantly, the court is left in the dark as to the outstanding debts on the property such as the mortgage bond and municipal rates and other levies. It is also apparent from the whatsapp messages attached to the replying affidavit that the instalment of the mortgage bond is R14 000.00 per month, that respondent is not in a financial position to service the mortgage bond and that the bank may foreclose the mortgage bond and sell the property in execution.

- [11] According to applicant, respondent owns crypto currency to the value of R400 000.00. The respondent confirms speculating and building up a crypto currency portfolio, but denies that it ever amounted to R400 000.00. According to him the value of the portfolio fluctuates from day to day. He failed to provide the value thereof as on the date of deposing to his answering affidavit, but it appears from the whatsapp messages attached to the replying affidavit that the value at that stage was merely R50 000.00 and that this money was destined

to settle respondent's overdraft and credit card accounts. Applicant's averment in reply that her "entitlement to the crypto currency is unchallenged in law" is not correct. It has to be determined what the net values of the estates are and which estate has accrued the most.

[12] Mr Roux submitted that respondent implicitly accepted that applicant has a contingent right deserving of protection. I do not agree. Respondent refers to a "possible contingent accrual claim" and "alleged right of accrual", but it is clear that he is of the view that applicant presented a "hopeless case". Having considered the totality of the evidence presented I am satisfied that applicant failed to allege and prove a contingent

right which will become vested upon dissolution of the marriage. Cloete J explained the difference between a contingent and vested right with sufficient clarity in *Reeder v Softline Ltd* and another.[3] and it is not necessary to expand thereon. As mentioned, there is no indication that the accrual – if there is an accrual

- in respondent's estate is greater than the accrual – if there is an accrual - in the applicant's estate.

[13] I agree with Bester AJ in *RS v MS*[4] that an applicant in these kind of proceedings does not have a general right to prevent the respondent from freely dealing with

his/her own separately held property in respect of which the applicant has no vested, but a mere contingent, right. However,

it is trite that the court may grant an interdict to protect even a contingent right, but in such case it must at least be shown (i) that, prima facie, respondent has no bona fide defence against the alleged contingent right and (ii) the respondent has the intention to defeat the claim or render it hollow by dissipating or secreting assets. Anti-dissipation relief is granted with reluctance and only in the clearest of cases.[5] Over and above the aforesaid requirements an applicant must also show a well-grounded apprehension of irreparable harm if the interdict is not granted and that no other satisfactory remedy is available.

[14] I accept that although respondent has taken the immovable property off the market, he may start marketing it immediately, either

personally, or through an estate agent. This may present a risk to applicant, but bearing in mind the lack of evidence before me, I am not prepared to grant relief as requested. The crypto portfolio can be disposed easily. I accept this, but no case has been made out to interdict trading in the currency. Applicant also seeks an interdict to "all other movable assets", but failed to give any detail in this regard.

[15] In conclusion, I repeat that the value of the contingent right which applicant seeks to protect has not been quantified insofar as applicant did not even attempt to set out the assets and liabilities of the parties' separate estates and consequently, she is not entitled to relief.[6] Furthermore, although it is apparent that respondent finds it difficult at this stage to comply with his financial obligations,

particularly pertaining to the mortgage bond payments, there is nothing on record before me to show that respondent intends to

dissipate his assets with the intention to defeat applicant's claim or to leave her with a hollow judgment. The application

stands to be dismissed and there is no reason why the general rule pertaining to costs should not be followed. Mr Benade sought a punitive costs order on the basis that the application was initially brought to obtain urgent relief to which applicant was not entitled and furthermore, she failed to meet the most basic requirements for applications of this nature. I do not believe that such an order is justified in this instance.

[16] The following order is granted:

1. The application is dismissed with costs.

J P DAFFUE J

On behalf of Applicant: ADV LA ROUX

(the heads of argument having been

drafted by ADV U LENNARD)

Instructed by: LAW OFFICES OF KAREN OLIVIER c/o

SYMINGTON & DE KOK

BLOEMFONTEIN

On behalf of Respondent: ADV H BENADE

Instructed by: BREYTENBACH MAVUSO c/o

PHATSHOANE HENNEY INC

[1] 88 of 1994

[2] 2016 (5) SA 211 (SCA) at par 16

[3] 2001 (2) SA 844 (WLD) at pp 848 J – 850 B

[4] 2014 (2) SA 511 (GJ) par 15

[5] Reeder loc cit at pp 849 – 851; Knox D'Arcy Ltd & others v Jamieson & others [1996] ZASCA 58; 1996 (4) SA 348 (A) at p 372 C

[6] Reeder loc cit at p 851 E – J and W v W (282/2018) ZAFSHC 44 (26 April 2018) par 10

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