

SOUTH AFRICA / JUDGMENT

I.N.P v N.P (9117/2023) [2023] ZAWCHC 210 (28 July 2023)

[2023] ZAWCHC 210

COURT

Western Cape High Court, Cape Town

BEFORE

Van Zyl

CASE / FILE NUMBER

9117/2023

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FLYNOTES: FAMILY – Divorce – Jurisdiction – Wife now residing in Portugal and a peregrinus – Divorce proceedings instituted by her in the High Court – Husband seeking an interdict aimed at overseas bank accounts – Court having jurisdiction to grant a decree of divorce will not, in terms of that jurisdiction alone, necessarily be competent to deal with other claims between the parties – Court not having jurisdiction to grant the relief sought by the applicant – Superior Courts Act 10 of 2013, s 21(1) – Divorce Act 70 of 1979 section 2(1).

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number: 9117/2023

In the matter between:

I[...] N[...] P[...]

Applicant

and

N[...] P[...] (born O[...])

Defendant

REASONS DELIVERED ON 28 JULY 2023

(delivered electronically via email)

VAN ZYL AJ:

Introduction

1. This application was brought on an urgent basis. After hearing argument, I dismissed the application on the ground that the Court lacked the jurisdiction to determine the matter. These are the decisions the decision.

The relief sought

2. The applicant sought a rule nisi, to operate as an interim interdict pending the return day, directing the respondent to return certain fund to overseas bank accounts. The funds, so the applicant stated, were transferred by the respondent from bank accounts either held jointly by the parties or in the applicant's name, to accounts under her control.
3. The applicant further sought an interdict prohibiting both parties

from accessing the funds in the joint bank accounts without the other party's prior written consent or a court order. Finally, he sought an interdict prohibiting the respondent from incurring any expenses in respect of the development of a property situated in Portugal, which property is registered in both parties' names, without the applicant's prior written consent.

4. At the outset of argument the applicant's counsel submitted that what was, in fact, sought in relation to the return of the funds was a mandament van spolie. This was the approach that had been taken in the replying affidavit. Although this is not entirely clear from the founding papers it makes little difference, as the parties were agreed that what was sought amounted to final interdictory relief on motion,[1] and that Plascon Evans[2] was applicable. Insofar as there as disputes of fact on the papers, such dispute is therefore to be determined on the respondent's version except if such version is needlessly bald or sketchy, far-fetched or palpably false.
5. The respondent opposed the application on the merits, but also raised the point that the Court lacked the jurisdiction to hear the application because she is not resident in South Africa, and the funds were moved from overseas accounts to be held in other overseas accounts.

6. The applicant argued that the respondent had acknowledged in

particulars of claim in a divorce action instituted by her in South Africa that she owned properties in Portugal and South Africa.

Furthermore, the issue regarding the funds was raised by the applicant in his counterclaim in the divorce action. For these

reasons, the Court had jurisdiction to determine the application.

Relevant

background

7. The parties were married in the Republic of Fiji in 1997. On 19 April 2023 the respondent instituted divorce proceedings in this Court under case number 6354/2023, in which she principally seeks a decree of divorce, maintenance for her and the parties' son, an order directing the applicant to transfer to her an amount or such assets as the Court may determine having a value equal to half of the difference between the value of the assets owned by them.
8. The parties moved to South Africa in 2004. They purchased a plot in Portugal in 2018 with the aim of developing it and building a house. According to the respondent, their intention was that they would eventually take up permanent residence in Portugal at their property there.
9. The respondent went to Portugal in 2022 to oversee the building work. She has resided there ever since. The parties' son has taken a temporary job as a labourer with the contractor in Portugal, and resides with the respondent and her parents (the latter also residing in Portugal). He had previously been studying in the United Kingdom.
10. The respondent says that she is permanently resident in Portugal, and that she has been so resident since March 2022. She has no reason or intention ever to reside in South Africa again, especially as her marriage relationship with the applicant has broken down. She has only been back to South Africa once for a period of 2 to 3 weeks to attend a wedding. She regards Portugal as her permanent place of residence. This was communicated to the applicant's attorney in correspondence exchanged prior to the launch of this application.
11. The applicant contends that the respondent's stay in Portugal is only temporary. Her actions, on his own version, belie this: he mentions that she had instructed a removals firm to ship a container of their household goods and furniture, including the applicant's personal belongings and files, to Portugal. The applicant did not agree with such course of action and stopped the shipment, but it does indicate the respondent's state of mind as regards her intentions of remaining in Portugal on a permanent basis, and supports her evidence in this respect.
12. A further indication of her state of mind is the fact that she has instituted divorce proceedings. She does not intend again taking up life with the applicant, who is at present living in South Africa. There is no reason to believe that she is contemplating returning to South Africa.
13. In these circumstances, and upon the respondent's version, I am satisfied that the respondent intends to remain in Portugal indefinitely and that she is a foreign peregrinus. Her domicile is there and she resides there.

Does this Court have the necessary jurisdiction to grant the relief sought?

14. Section 21(1) of the Superior Courts Act, 2013, provides, insofar as relevant, that a division of the High Court “has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance...”
15. Effectiveness, in other words, the principle that a Court will not pronounce of a dispute unless it has the power to give effect to the judgment), is the basis of the concept of jurisdiction. In *Ex parte Hay Management Consultants (Pty) Ltd*[3] the Court held that it would not have jurisdiction to entertain an application for an interdict against a foreign peregrinus because a South African court has no control over the defendant, nor over the cessation of the acts in question, and cannot entertain an application for an interdict against it.
16. Pollack on Jurisdiction[4] states the issue as follows in relation to both mandatory and prohibitory interdicts: “If the respondent is a peregrinus not only of the court but of the Republic of South Africa and the act which is the subject of the interdict to be performed or prohibited in a foreign country the court has no control over the respondent nor over the execution or cessation of the act in question and manifestly it cannot entertain an application for an interdict against such a respondent”.
17. There was no dispute between the parties that credit balances in bank accounts are regarded as incorporeal movables. The situs of these assets is the forum domicilii or the forum rei sitae – both refer to the place where the debtor in respect of the incorporeal right resides.[5]
18. It is common cause that the funds in the present matter are being kept in bank accounts at financial institutions in foreign jurisdictions, and will – should an order be granted in the applicant’s favour – have to be transferred by the respondent from Portugal to other overseas accounts.
19. The applicant emphasized that Nina instituted the divorce proceedings in South Africa, and stated in the particulars of claim that she is the co-owner of the parties’ South African property – the

conclusion

to be drawn is thus that she is ordinarily resident here. She has in any event consented to the jurisdiction of this Court.

Moreover, the Court hearing the divorce action will have the required jurisdiction to deal with all issues arising out of such action, and the whereabouts of the funds – including the respondent’s alleged unlawful transfer of them – has now been raised in the applicant’s plea and counterclaim.

20. As regards the alleged consent to jurisdiction, even if the respondent did consent to the jurisdiction of the Court for the purposes of the divorce action, her submission would not extend to prior proceedings for an interdict to restrain her from committing delicts in an application instituted separately from the divorce action,[6] and before the question of

interdictory relief was raised in the subsequent pleadings in the divorce action. The jurisdiction of the Court for the purposes of the divorce action is in any event specifically based on the requirements of section 2(1) of the Divorce Act, 1979, namely either domicile or residency on the part of either the plaintiff or the defendant, or both of them. The applicant

contends that the respondent is resident within the jurisdiction of this Court.

21. The fact that a court has jurisdiction in respect of certain legal proceedings does not confer jurisdiction in respect of other legal proceedings:[7]

“[7] *In Gulf Oil Corporation v Rembrandt Fabrikante en Handelaars (Edms) Bpk 1963*

- (2) SA 10 (T) at 17D - H Trollip J stated that 'cause' means an action or legal proceeding (not a cause of action) and that 'a cause arising within its area of jurisdiction' means 'an action or legal proceeding which, according to the law, has duly originated within the Court's area of jurisdiction'. Further support for this interpretation is to be found in the Afrikaans text of s 19(1)(a) and (b) where the words 'gedinge wat . . . ontstaan' and 'geding met betrekking waartoe' are used as the Afrikaans equivalent for 'causes arising' and 'cause in relation to which'. Trollip J concluded:

'The result is that the Court's jurisdiction under s 19(1) is simply determined, as hitherto, by reference to the common law and/or any relevant statute.'

...

- [8] ... The fact that a court has jurisdiction in respect of certain legal proceedings does not confer jurisdiction on such a court in respect of other legal proceedings. The onus of proving submission was on the respondents. They failed to make out any case whatsoever that either the appellant or the insurance companies submitted to the jurisdiction of the Court of first instance...” [Emphasis supplied.]
22. This application was instituted on 6 June 2023. It is common cause that the respondent resided in Portugal at the time, and still resides there. The applicant delivered his plea and counterclaim in the divorce action only thereafter (in the papers, he indicates that he planned to deliver it by 12 June 2023, but in the course of argument it was mentioned that those pleadings were delivered two weeks after the institution of the application).
23. The Court’s jurisdiction is determined at the time of service on the respondent of the application papers.[8] Where an applicant claims jurisdiction based on the respondent’s residence, as in the present case, the respondent must be residing with the jurisdiction of the Court as at the time of the commencement of proceedings.[9]

24. The question whether a person resides at a particular place at any given time depends on all the circumstances of the matter. Although a person may have more than one residence, for the purpose of determining jurisdiction a person can only be residing at one place at any given time – notably, the commencement of the proceedings upon service of the papers.[10] Further to this:[11]

“[5] Amongst the more appropriate and apt definitions of residence (in the sense of 'residing') are those in Hogsett v Buys 1913 CPD 200 at 205 ... namely there must be 'some good reason for regarding it as his place of ordinary habitation at the date of

service' and Beedle & Co v Bowley (1895) 12 SC 401 at 403 to the effect that

'(w)hen it is said of an individual that he resides at a place it is obviously meant that it is his home, his place of abode, the place where he generally sleeps after the work of the day is done.'”

25. I have already found, on the facts as they appear from the papers, that the respondent is permanently resident in Portugal.
26. A court having jurisdiction to grant a decree of divorce will not, in terms of that jurisdiction alone, necessarily be competent to deal with other claims between the parties. In Rousalis v Rousalis[12] the plaintiff instituted divorce proceedings and sought payment of an amount of money held in a joint account pursuant to an alleged oral agreement concluded between the parties. The Court held that it had no jurisdiction to deal with a contractual claim between the spouses where the spouse against whom the relief was sought was resident in Greece:

“It is clear that on these allegations we are dealing not with an action for divorce plus ancillary relief, but with two causes of action brought in one suit. The primary one is that relating to the status of the plaintiff, in regard to which this Court had jurisdiction by virtue of s 2(1)(b)(iii) of the Divorce Act 70 of 1979. The allegations in para 8 of the particulars of claim in so far as they relate to the money plaintiff claims in her own right and not as sole guardian of her son

- should sole guardianship be awarded her - are based on contract, not the marriage. ...

... Our Courts cannot assume jurisdiction over foreign nationals in foreign countries and pronounce judgments sounding in money whether in contract or in delict merely because we have assumed jurisdiction under this statute to pronounce upon the status of a

limited class of reasonably permanent residents in our own territory..... And a divorce action is defined as an action by

which a decree of divorce "or other relief in connection therewith is applied for", including an application for maintenance pendente lite or for a contribution towards costs. Technically, therefore, it appears that this Court has jurisdiction to order maintenance and costs as relief in connection with a decree of divorce. But I know of no principle or provision which would entitle me to settle a partnership dispute where defendant is domiciled and resident in Greece and without property in this country which has been attached to found jurisdiction.” [Emphasis supplied.]

27. Although Rousalis was decided before the amendment of section 2(2) of the Divorce Act in 1992 to the effect that a “court which has jurisdiction in terms of subsection (1) shall also have jurisdiction in respect of a claim in reconvention or a

counter-application in the divorce action concerned”, I am of the view that the principle underlying the decision remains apposite. The application for interdictory relief was instituted as a proceeding separate from the divorce action, and before the relief set out in the application was reformulated to be incorporated in a counterclaim for appropriate relief in the context of divorce proceedings. I have already referred to the meaning of “causes arising” as contemplated in section 21(1) of the Superior Courts Act.>

Conclusion

28. In all of the circumstances, I am of the view that this Court does not have the jurisdiction required to grant the relief sought by the applicant. For that reason, the application was dismissed.

P. S. VAN ZYL

Acting judge of the High Court

Appearances:

For the applicant: J. Anderssen, instructed by Mandy Simpson Attorneys

For the respondent: G. Cooper, instructed by Catto Neethling Wiid Inc.

- [1] The mandament being an interdict in respect of which special rules or practices have developed: Joubert et al (eds) *The Law of South Africa* (2ed) Volume 2 at para 409.
- [2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984
- (3) SA 623 (A) at 634-635.
- [3] 2000
- (3) SA 501 (W) at 507H; and see *South Atlantic Islands Development Corporation v Buchan* 1971 (1) SA 234 (C) at 240D-H.
- [4] *Pistorius Pollack on Jurisdiction* (2ed, Juta) at page 119.
- [5] See *Broboff v National Director of Public Prosecutions* 2021 (2) SACR 53 (SCA) at para]10]; and see *Gallo Africa Ltd v Sting Music (Pty) Ltd* 2010
- (6) SA 329 (SCA) at para [14].
- [6] Ex parte Hay Management supra at 507J.
- [7] See *Leibowitz t/a Lee Finance v Mhlana and others* 2006 (6) SA 180 (SCA) at paras [7]-[8].
- [8] *Terblanche NO v Damji* 2003

(5) SA 489 (C) at 498E-F. See also Gallo Africa v Sting Music supra at paras [10] and [13]-[14].

[9] See the discussion in Mills v Starwell Finance (Pty) Ltd 1981 (3) SA 84 (N).

[10] Mayne v Main 2001 (2) SA 1239 (SCA) at paras [3]-[4].

[11] Mayne v Main supra at para [5].

[12] 1980

(3) SA 446 (C) at 449G-450A.

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Prepared on 9 October 2026 · Esheria