

SOUTH AFRICA / JUDGMENT

Kruger N.O v M.R.M and Another (M432/2023) [2025] ZANWHC 45 (21 February 2025)

[2025] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

FMM Reid

CASE / FILE NUMBER

M432/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M432/2023

In the matter between:-

DOUGLAS CLIFFORD KRUGER NO Applicant and M[...] R[...] M[...] 1st Respondent M[...] J[...] M[...] 2nd Respondent

This judgment is handed down electronically by distribution to the legal representatives of the parties e-mail addresses. The date that the judgment is deemed to be handed down is 21 February 2025.

JUDGMENT

FMM REID J

Introduction

[1] The applicant is the appointed liquidator and receiver of the joint estate in the finalised divorce proceedings between the 1st and 2nd respondents. The applicant seeks a mandatory final interdict against the 1st respondent to execute his duties as the appointed liquidator.

[2] The interdict is sought in the following terms:

2.1. An order directing the 1st respondent to grant Amazing Properties Estate Agents or any estate agent appointed by the applicant and any prospective buyers, undisturbed access to 5[...] K[...] Street Unit 1[...] Mmabatho (the 1st immovable property) to view and value the property for the purposes of marketing and selling the immovable property.

2.2. An order directing the 1st respondent to grant Amazing Properties Estate Agents, or any estate agent appointed by the applicant, and any prospective buyers, undisturbed access to 1[...] M[...] Road Unit [...], Mmabatho (the 2nd immovable property) to view and value the property for purposes of marketing and selling the immovable property.

2.3. In the event that the 1st respondent refuses access to the properties, the applicant, Amazing Properties Estate Agent or other agents appointed by the applicant, is authorised to engage the services of a locksmith and the members of the South African Police Service (SAPS), who is ordered and directed to assist the applicant to gain undisturbed access for the purposes of valuating, marketing and selling the aforementioned properties.

2.4. That the 1st respondent pays the costs of the application on an attorney and client scale.

[3] A court order issued by in the Regional Court for the Regional

Division of North West, held at Mmabatho under case number NW/MMB/RC/2003/2019 on 30 September 2022 (the court order) duly appoints the applicant as the liquidator and receiver of the joint estate of the 1st and 2nd respondent.

[4] In terms of the court order the applicant is appointed with specific powers and duties executable in the division of the joint estate of the respondents.

[5] The application is necessitated by the failure of the 1st respondent to enable the applicant to execute his duties as the appointed liquidator of the 1st and 2nd respondent's joint estate.

Material factual

background

[6] The 2nd respondent resigned from his employment shortly after summons commencing the divorce proceedings between the 1st and 2nd respondent, was served on him. On his resignation, he received 50% of the pension money from the Government Employees Pension Fund.

[7] A final decree of divorce (the divorce order) was granted on 27 May 2022 by the Regional Court for the Regional Division of the North West, held at Mmabatho. The divorce order reads as follows:

“THAT the bonds of marriage subsisting between the PLAINTIFF and the DEFENDANT be and are hereby dissolved.

DECREE OF DIVORCE GRANTED. EQUAL DIVISION OF THE JOINT ESTATE. BOTH THE PLAINTIFF AND DEFENDANT BE AWARDED FULL PARENTAL RESPONSIBILITIES AND RIGHTS IN TERMS OF SECTIONS 18, 19, AND 20 OF THE CHILDREN'S ACT 38 OF 2005 IN RESPECT OF THEIR MINOR; INCLUDING IN RESPECT OF GUARDIANSHIP IN TERMS OF SECTION 18(2)-(3) OF ACT 38 OF 2005. THE PRIMARY CARE AND RESIDENCE OF THE MINOR CHILD IS AWARDED TO THE PLAINTIFF, EACH PARTY TO PAY OWN COST."

(own emphasis)

- [8] On finalisation of the divorce, the remaining 50% of the 2nd respondent's pension fund was paid to him. The 2nd respondent thus received 100% of his pension money. The 1st respondent claims that she was entitled to 50% of the 2nd respondent's pension money, as part of the equal division of the joint estate.
- [9] It is argued on behalf of the 1st respondent that she has not received her 50% share of the 2nd respondent's pension money.
- [10] The 1st respondent is opposing this application on the basis that she is entitled to receive 50% of the 2nd respondent's pension money, which would equate to the amount of R1,408,856.07. This, she argues, would be a monetary value which is approximately equal to the 1st respondents undivided half share in the fixed properties that are the subject matter of this application. As such, so the argument goes, she would be in a financial position to "buy" the 2nd respondent's share in the immovable properties. Put differently, she intends to have the value of 50% of the 2nd respondent's pension money, set off against the undivided half share of the 2nd respondent's interest in the immovable properties.
- [11] The 1st respondent argues that the 2 properties include that of her primary residence and, because she intends to purchase the property with the 50% of the 2nd respondent's pension money, the applicant does not have the right to sell the properties.
- [12] The 1st respondent argues that the 1st respondent can "keep" the 50% share of the pension money due to her, and she then proverbially purchases the 50% share of the 2nd respondent in the properties, becoming the sole owner of the properties. The 1st respondent sets out this argument as follows in her opposing affidavit:

"7.1 The content hereof is noted. It should also be pointed out that the 2nd respondent has always maintained that he does not want the immovable property, only money.

7.1.1 It is me who wants the immovable property. So, if I owe the 2nd respondent R650,000.00 for the immovable property, and the 2nd respondent owes me R1,408,856.07 from his half share of his pension, why not just subtract the R650,000.00 from what the 2nd respondent owes me, and I become sole owner of the property. It cannot be just and equitable to sell my home when the 2nd respondent owes me R1,408,856.07."

- [13] The 1st respondent is thus applying the principle of set off, unilaterally and post granting of the divorce order.

Legal principles

- [14] The 1st respondent relies on the matter of *GN v JN* 2017 (1) SA 342 (SCA) in which the majority judgment held that the pension fund formed part of the joint estate, whether it was specified or not as such in the summons and settlement agreement. The matter in *GN v JN* 2017 (1) SA 342 (SCA) differs from the matter in *casu* since the 2nd respondent resigned upon receipt of the divorce summons and received 50% of the pension money. After the divorce, the 2nd respondent received the other 50% of the pension fund. In *GN v JN* there was no resignation with a partial pay-out to one of the divorced parties, prior to the divorce proceedings being finalised.
- [15] In *GN v JN* the SCA confirmed that the joint estate is to be calculated as on the date of divorce. It is stated in paragraph [25] that:

“[25] Accordingly, the writer notes that, absent a court order in terms of s 7(8), the non-member spouse effectively forfeits his or her entitlement to a share in the pension interest of the member spouse. I do not agree with these sentiments for the following

reasons.

First, s 7(7)(a) is self-contained and not made subject to s 7(8). It deems a pension interest to be part of the joint estate for the limited purpose of determining the patrimonial benefits to which the parties are entitled as at the date of their divorce.”

(own ephasis)

- [16] Should *GN v JN* be applied to the facts in *casu*, the pension interest held by the 2nd respondent, as at date of the divorce, would be 50% of the total of the pension pay-out. The 1st respondent, in application of *GN v JN*, would then be entitled to half of the 50% pension money held by the 2nd respondent, effectively entitling the 2nd respondent to 25% of the 2nd respondent's pension pay-out.
- [17] This being said, the question whether the 1st respondent is entitled to the aforesaid claim of 50% of the 2nd respondent's pension money, 25% of the 2nd respondent's pension money, or any amount of the 2nd respondent's pension money, is not before this Court for determination or to make any pronouncement on.
- [18] The liquidator is appointed to divide the joint estate with the powers to (a) take possession of all assets, movable and immovable, that belongs to the joint estate, and (b) sell any assets, movable and immovable that belongs to the joint estate. The powers of the liquidator were bestowed on the liquidator on 30 September 2022 and it follows logically that the assets of the joint estate referred to, would be the assets of the joint estate as on 27 May 2022 (the date of the divorce).

- [19] The only issue that this Court must decide, is whether the applicant has made out a case for the relief sought in the notice of motion, which is 3 final interdicts.
- [20] It is trite law that the following requirements need to be met for an applicant to be successful in the application for a final interdict:
- 20.1. The applicant must demonstrate a clear right to the relief sought;
- 20.2. The applicant must have a reasonable apprehension of irreparable harm; and
- 20.3. The applicant must have no other remedy available to it.
- [21] These trite principles have been established and confirmed in the matters such as *Setlogelo v Setlogelo* 1914 AD 221 at 227; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015
- (3) SA 532 (SCA) ([2014] ZASCA 169) para 26; *Red Dunes of Africa v Masingita Property Investment Holdings* [2015] ZASCA 99 para 19; *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) in para 39.
- [22] If the applicant establishes all 3 requirements of a final interdict, the Court will have a very limited discretion in deciding whether to grant such relief or not. The question of whether the Court has a general discretion in whether to grant a final interdict after the applicant has indeed established all 3 the requirements, has been tested against a constitutional background and has been decided as follows in the matter of *Hotz and Others v University of Cape Town* 2017 (2) SA 485 (SCA):

“[29] The law in regard to the grant of a final interdict is settled. An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. Once the applicant has established the three requisite elements for the grant of an interdict, the scope, if any, for refusing relief is limited. There is no general discretion to refuse relief. That is a logical corollary of the court holding that the applicant has suffered an injury or has a reasonable apprehension of injury and that there is no similar protection against that injury by way of another ordinary remedy. In those circumstances, were the court to withhold an interdict, that would deny the injured party a remedy for their injury, a result inconsistent with the constitutionally protected right of access to courts for the resolution of disputes, and potentially infringe the rights of security of the person enjoyed by students, staff and other persons on the campus.”

(own emphasis)

- [23] I now proceed to discuss each of these requirements individually.
- [24] Clear right: The applicant's rights is derived from the divorce order dated 30 September 2022. The applicant has established the requirement of having a clear right to the relief sought. The defence of the 1st respondent regarding set-off of the pension amount to the monetary value of the properties, has no impact on whether the applicant has a right, and a legal duty, to execute his mandate as liquidator of the joint estate.

- [25] Reasonable apprehension of irreparable harm: It is stated in Erasmus Superior Court Practice Volume 2: Uniform Rules and Appendices/ Part D Rules/D6 Interdicts on RS 17, 2021, D6-15 that the second requirement of a final interdict can be described as follows:

“The second requisite for obtaining a final interdict is proof of an injury actually committed or reasonably apprehended, in other words, proof of some act actually done showing interference with the applicant’s rights, or of a well-grounded apprehension that acts of the kind will be committed by the respondent.

The word ‘injury’ is not an exact or appropriate equivalent for ‘een gepleegde feite-lijkheid’, and the authorities clearly use the word as meaning an act of interference with, or an invasion of, the applicant’s right, and resultant prejudice. The absence of any possible prejudice to the applicant will result in the refusal of the interdict. In fact, unless he shows that he is suffering or will suffer some injury, prejudice, or damage or invasion of right peculiar to himself and over and above that sustained by members of the public in general, the applicant has no locus standi in interdict proceedings. Prejudice does not mean actual damage and it is sufficient to establish potential prejudice. ...

The injury must be a continuing one: the court will not grant an interdict restraining an act already committed.” (footnotes omitted)

- [26] The divorce order must be executed, and the joint estate must be divided to finalise the divorce. In preventing access to the applicant, the 1st respondent is creating a position where the joint estate cannot be divided in accordance with the divorce order.
- [27] I find that the applicant has established a reasonable apprehension of irreparable harm should the relief not be granted.
- [28] No alternative satisfactory remedy: The applicant sets out all the steps taken in various attempts to give effect to the court order. I find that the applicant has satisfied the requirement, and that the applicant is left with no alternative satisfactory remedy than approaching this Court for the relief claimed.

Analysis

- [29] Having come to the above findings that the applicant has met all the requirements of the interdict sought, the discretion of the court is very limited in refusing to grant the interdict.
- [30] The applicant has proven all the requirements of a final interdict. The 1st respondent’s defence deals with the calculation of the monetary value of the joint estate, more specifically whether the pension fund of the 2nd respondent forms part of the joint estate. The calculation in the division of the joint estate is not before this Court to decide.
- [31] There is no agreement between the parties that the 2nd respondent’s pension fund pay-out should be taken into calculation in the determination of the value of the joint estate.

Conclusion

- [32] The 1st respondent's intention to have her 50% share of the 2nd respondent's pension set off against the value of the 2nd respondents interest / share of the immovable properties, is not a defence in this application, which would prevent the applicant from exercising his duties as the duly appointed liquidator of the joint estate.
- [33] Having complied with all the requirements, I find no reason to not grant the interdict in favour of the applicant.
- [34] It follows that the application should be successful.

Costs

- [35] The general principle is that the successful party is entitled to his/her cost incurred in the proceedings.
- [36] I find no reason to deviate from the general principle. Only the 1st respondent has opposed the application and as such the 2nd respondent is exempted from a cost order against him.
- [37] The applicant seeks a punitive cost order (on an attorney and client basis) against the 1st respondent for her refusal to cooperate with the applicant in execution of his duties as liquidator. Punitive cost orders are granted where there is malice in a party's conduct. The 1st respondent acted on legal advice provided to her, and the question of whether the pension money that was left as at the date of the divorce, forms part of the joint estate or not, is not an easy issue to resolve. In fact, the Supreme Court of Appeal had different views in *GN v JN* which is expressed in a majority and minority judgment. On this basis I find that a punitive cost order would be unfair to the 1st respondent.
- [38] It follows that the 1st respondent is ordered to pay the costs of the applicant.

Order

In the premise, I make the following order:

- i) A final interdict is granted ordering and directing the 1st respondent to grant Amazing Properties Estate Agents or any other estate agents appointed by the applicant and any other estate agents appointed by the applicant undisturbed access to the immovable property situated at 1[...] M[...] Road Unit [...], Mmabatho in order to view the inside and outside of the aforementioned immovable property and to value the immovable property for purposes of marketing and selling the immovable property.
- ii) A final interdict is granted ordering and directing the 1st respondent to grant Amazing Properties Estate Agents or any other estate agents appointed by the applicant and any other estate agents appointed by the applicant undisturbed access to the immovable property situated at 5[...] K[...] Street Unit 1[...] Mmabatho in order to view the inside and outside of the aforementioned immovable property and to value the immovable

property for purposes of marketing and selling the immovable property.

[39] That, in the event that the 1st respondent refuses to grant Amazing Properties Agents and any prospective buyers as secured by Amazing Properties Estate Agents or any other estate agent appointed by the applicant undisturbed access to the immovable property situated at 5[...] K[...] Street Unit 1[...] Mmabatho and the immovable property situated at 1[...] Mokale Road Unit [...], Mmabatho, in order to view the inside and outside of the aforementioned immovable properties for purposes of valuating, marketing and selling the immovable properties, the applicant and or Amazing Properties Estate Agents or any other estate agents as appointed by the applicant is hereby authorised to engage the services of a locksmith and that the members of the South African Police is hereby ordered and interdicted to assist the aforementioned estate agent or any other estate agents as appointed by the applicant and any prospective buyers as secured by the aforementioned estate agents to gain undisturbed access to the aforementioned immovable properties in order to view the inside and outside of the aforementioned immovable properties for purposes of valuating, marketing and selling the aforementioned movable properties.

iii) The 1st respondent is ordered to pay the applicant's costs on Scale C of Rule 67A of the Uniform Rules of Court, on a party and party basis.

FMM REID

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

DATE RESERVED: 16 AUGUST 2024

DATE DELIVERED: 31 OCTOBER 2024

DATE HANDED DOWN: 21 FEBRUARY 2025

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