

SOUTH AFRICA / JUDGMENT

L.M v F.M (10502/2016) [2016] ZAWCHC 203 (15 December 2016)

[2016] ZAWCHC 203**COURT**

Western Cape High Court, Cape Town

BEFORE

Canca, AJ

CASE / FILE NUMBER

10502/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case No: 10502/2016****In****the matter between:**

L
M (nee
W) Applicant
and
F
M Respondent

Coram:

Canca,
AJ
Date

of Hearing:

21
November 2016
Date

of Judgment:

15
December 2016

JUDGMENT

INTRODUCTION

1. The applicant and the respondent are husband and wife. Their marriage was not successful. They are engaged in divorce

proceedings. They own the property described hereunder in undivided shares, the applicant owning a two third and the respondent, a one third share. In this application, the applicant asked for the termination of their joint ownership of the property under the actio communi dividundo, and for related relief, as set forth hereunder.

2. The orders sought in the Notice of Motion, in summary, are that:

2.1 Erf [...] Pinelands, known as [...], Pinelands, Western Cape (“the property”), registered in the names of both the applicant and the respondent, with each holding a two-third undivided share and a one-third undivided share respectively in the property, be sold at market value within 60 (sixty) days from the date of the order;

2.2 The applicant has the first option to purchase the property. Alternatively, in the event of the applicant not electing to exercise the option, that the respondent purchase the property and, further alternatively, should the respondent elect not to purchase same, that the property be sold in the open market;

2.3 The parties be directed to sign all such documentation as required in order to affect transfer of the property into the name of the applicant or a new owner. In the event that either of the parties fail to sign such documentation upon request, the Registrar and/or the Sheriff of the High Court be authorised and empowered to sign such documentation on the applicant or the respondent’s behalf.

2.4 Upon registration and transfer of the property into the name of the new owner, the following expenses be deducted from the proceeds of the sale and paid:

2.4.1 The selling commission due to the agent who was the effective cause of the sale (if applicable), alternatively, should the property be sold on public auction, the auction fees payable in respect of the sale (if applicable);

2.4.2 The costs of obtaining an entomologist or electrician’s certificate;

2.4.3 Any outstanding rates, taxes, utility bills and/or levies;

2.4.4 Other necessary and ancillary costs relating to the sale of the property, namely a gas certificate, a beetle certificate and such like.

2.5 The applicant is entitled to payment of two-thirds of the proceeds from the sale of the property after deduction of the costs set out in paragraph 2.4 forthwith upon registration of transfer.

2.6 The respondent's one-third share of the proceeds from the sale of the property, after deduction of the costs set out in paragraph 2.4, be retained in Trust by the conveyancing attorney pending the resolution of a dispute regarding the applicant's entitlement to repayment of the monies set out in paragraphs (b) to (k) and paragraph 7 of the agreement entered into between the parties on 14 July 2015, referred to in paragraph 7 below, is determined.

2.7 The market related price of the property shall be determined by a sworn valuator alternatively, in the event that the respondent disputes the valuation by the aggregate between two valuations made by sworn valutors, one to be appointed by the respondent at his cost. In the event that the respondent fails to obtain a report from a sworn valuator appointed by him within 60 (sixty) days of date of this order, the remaining valuation shall be regarded as the market related price of the property.

2.8 The respondent pay the costs of the application on an attorney and client scale.

3. The respondent consents to the relief sought in paragraphs 2.1, 2.2, 2.3, 2.4 and 2.7 above. Only the following relief, namely
 - (a) the declaratory order sought in para 2.5; (b) the anti-dissipation interdict sought in para 2.6 and (c) the costs order sought against him in paragraph 2.8 is opposed by the respondent.
4. The respondent has, in turn, brought a counter-application in which he seeks three orders. These are that (1) the Order granted on 29 August 2016 in respect of a Chamber Book application be rescinded;
 - (2) the relief prayed for in paragraphs 2.5, 2.6, and 2.8 above be struck out or, in the alternative, be dismissed and (3) costs be awarded against the applicant on the attorney and client scale.

BACKGROUND

5. The applicant is an attorney who mainly practices in the field of family law. She is also the instructing attorney in this matter. The respondent is a self-employed businessman who runs a garden service business from the property. The applicant and the respondent were married to each other on 22 February 2015, out of community of property, without accrual. There are no children born out of the marriage. As stated earlier, the marriage was not successful, the applicant having issued summons for a Decree of Divorce out of this Court on 21 April 2016.
6. A few months after their marriage, the parties purchased the property from the respondent's parents in July 2015. The applicant avers in her founding affidavit that pursuant to the purchase of the property she obtained a mortgage bond in the amount of R500 000 with First National Bank over the property and secured an advance of R1 500 000,00 with

Nedbank, as she already had a mortgage bond registered with it in respect of a flat she owned in Sea Point. She used this advance and certain other monies to pay the remainder of the purchase price of the property.

7. It appears from the founding affidavit that, although the applicant was interested in purchasing another property in the area, she agreed to purchase the property, subject to there being substantial renovations done to it. The respondent agreed to this. The parties then concluded a written agreement on 14 July 2015 in terms of which the applicant sought to record in writing the terms for the repayment of the renovations and the other costs she incurred or would incur in respect of the property.

8. The material terms of the agreement include the following:

“RENOVATIONS

- a) The property is in dire need of renovation. The costs of renovating the property are being paid for in full by L. [the applicant].
- b) L. will be fully reimbursed for the cost of renovation on the sale of the property or in any other event whereby the property is alienated from the parties. Alternatively L. will be reimbursed within two weeks after demand to F. [the respondent] for repayment which demand is to be made in writing.
- c) The cost of the renovation amounts to R400 000 and both parties agree that no proof need be provided in support of this figure.
- d) The aforementioned amount will be updated in terms of the Consumer Price Index when same becomes due. More specifically if payment is due in ten years' time to L. then, and in such event, she will be reimbursed the equivalent of R400 000 as at its value after ten years.

BOND COSTS

- e) L. will be fully reimbursed for the bond costs she has paid for the registration of the bonds to Nedbank and FNB and ancillary costs.
- f) The interest accrued on the bond amount will also be reimbursed to L.. For example in the event that L. settled the bond and at that time the interest accrued at that time amounts to R500 000 she will be entitled to reimbursement of that interest amount.
- g) The reimbursement of the bond costs, ancillary costs and interest will be payable as per paragraph (b) hereinabove i.e. upon sale or alienation of the property or on demand.
- h) These amounts will be updated in terms of the Consumer Price Index when they fall due as per paragraph (d) above.

TRANSFER FEES

- i) L. will be fully reimbursed for the transfer costs that she has paid for the registration of the property. The transfer costs include transfer fees and transfer duty amongst other ancillary fees as per the pro forma invoice from the conveyancing attorneys.
- j) The reimbursement of the abovementioned costs will be payable as per paragraph b) hereinabove as well as paragraph (d).

GAS CERTIFICATE AND ELECTRICAL CERTIFICATE

- k) It is recorded that L. has paid for the Gas Certificate and Electrical Certificate despite the Agreement of Sale of 2 Pleasant Place stating that the sellers would take responsibility for same. The costs have been R2 000 (for the gas certificate) and R1 200 (for the electrical certificate). Reimbursement will occur as per paragraph (b) and (d) above.

7. F. and L. further wish to record that to the extent that F. has facilitated the renovations L. agrees to waive 100% of the transfer duty costs as mentioned in paragraphs in (i) and (j) above.“

9. Following the breakdown of the marriage and the institution of the divorce proceedings, the applicant attempted to secure the respondent's

consent to the sale of the property. The parties could not agree on a sale price. In an endeavour to obtain the property's

market value, the applicant procured a valuation from a registered property valuer who valued the property at R3 850 000.

The respondent, on the other hand, based on the opinion of an estate agency familiar with the property values in that area, felt that the market value of the property was R4 000 000 net of an estate agent's commission of approximately R200 000.

10. The essence of the respondent's defence is that the applicant has failed, in her founding affidavit, either on the facts or the law, to make out a case which would justify the grant of the relief set out in paragraphs 2.5, 2.6 and 2.8 above. It was contended on behalf of the respondent that, insofar as the declaratory relief sought in paragraph 2.5, the applicant, foresaw a dispute as to the amount she was allegedly entitled to as reimbursement. The applicant, herself, avers in her founding affidavit that there is a factual dispute as to the amount of reimbursement due to her. Therefore, the applicant ought not to have proceeded by way of motion but rather by way of an action, so the contention continued. The relevant portion of the applicant's founding affidavit reads as follows:

“I understand from the correspondence exchanged between the parties that Respondent is disputing his indebtedness in terms of the agreement entered into between us on 15 July 2017. I, on the other hand, intend to rely on the terms of this agreement. At the very least, the respondent is indebted to me in the sum of R400 000 representing the costs of renovations paid for in full by me as well as further ancillary costs, which he undertook to repay me. As we cannot appear to resolve this factual dispute in these papers, I submit it would be just and equitable that Respondent's share from the proceeds of the

property be retained in trust pending the resolution of the dispute. I have pleaded both verbally and in writing with the respondent to attend at Mediation in an effort to resolve this dispute amicably and cost effectively, but to no avail”

11. The respondent finds support for the aforesaid contention in Harms Amler’s Precedents of Pleadings Eighth Edition where, at page 152, the learned author states that if a dispute of fact is foreseeable, a declaration of right should be sought by way of action.
12. The principles to resolve factual disputes in motion proceedings are trite and need not be repeated here. See the locus classicus on the topic, Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) at 634 E – 635 C and National Director of Public Prosecutions v Zuma

[2009] ZASCA 1; 2009 (2) SA 277 (SCA) paras 26 – 27. Although Ms Smit, for the applicant, argued that Plascon Evans does not find application in matters of contractual interpretation, Mr van Rensburg, for the respondent, contended that contractual

interpretation is not a special category of law whereby a factual dispute is excluded from the ambit of the Plascon Evans rule. I do not agree with Ms Smit or Mr van Rensburg. Where the wording of a contract is clear, the Plascon Evans approach, in my view, does not apply. The contract, in such circumstances, must be implemented in accordance with its clear meaning. If the meaning is not clear and extraneous evidence is legally permitted to assist in its interpretation, for example, evidence on background circumstances, the Plascon Evans rule will apply to such evidence.

13. In the concluding paragraph of her replying affidavit and in Heads or Argument, the applicant prays that, in the event that I was

disinclined to grant the relief sought or alternate relief, the matter should be referred to oral evidence in order to resolve the dispute. I accept that there are material disputes of fact regarding some of the amounts to be reimbursed to the applicant

particularly in the light that she has conceded to this in her papers. The respondent contends that he is entitled to a third

of the current value of the property without any set off or deduction. He claims that he is not liable for the repayment of any mortgage bond, only the interest on the bond with First National Bank. Also, he denies liability for any portion of the R1 500 000,00 advance secured by the applicant from Nedbank in respect of her Sea Point flat. The third major point in dispute is whether the reimbursements set out in the agreement are to be paid before any pro rata allocations are made and whether same should be paid from the respondent’s share.

14. Snyman AJ, in Jonsson Workerwear (Pty) Ltd v Williamson & Another

(2014) 35 ILJ 712 (LC) at para 16, the learned Judge, having examined the authorities dealing with Rule 6(5)(g) of the Uniform Rules of Court - the Rule applicable to referral of motion proceedings to oral evidence – held that:

“... it is clear that as a general principle, the Court has a discretion whether to refer motion proceedings to oral evidence where there is a dispute of fact that needs to be resolved. In exercising this discretion a litigant applying for a matter to be referred to oral evidence should at least advance reasonable grounds to support this discretion being exercised in favour of the litigant. Proper and formal application must be made in this regard. It should at least set out what evidence presented by the other litigating party in the affidavit is lacking in credibility and how the referral to oral evidence will resolve this. The Court should consider to what extent this referral to oral evidence tip the scales in support of the litigant seeking the referral. The final issue is convenience to the Court.”

15. The applicant has not made out a proper case for referring the matter to oral evidence in terms of the principle set out by Snyman AJ in paragraph 14 above. Merely asking that the matter be referred to oral evidence in one sentence in her replying affidavit and as an alternate submission in Heads of Argument is simply not sufficient to meet the test set out in Jonsson Workerwear supra. Moreover, as was correctly argued by Mr van Rensburg, as a general rule, applications for oral evidence are made in limine and are only granted in exceptional circumstances. See Law Society, Northern Provinces v Mogami 2010 (1) SA 186 (SCA) 195 C – D. There are no exceptional circumstances in this matter and, absent a proper and formal application therefor, the applicant cannot succeed in her informal prayer for referral of the matter to oral evidence. Moreover, the

issues

to be decided at such a hearing are, in my view, not sufficiently ventilated in the papers.

16. However, notwithstanding the sentiments expressed above I cannot fault the applicant for proceeding by way of motion and not action. The parties are in the process of divorcing and it is in both their interests that the issue of the sale of the property be resolved or finalised as speedily as possible particularly given that she appears to be the one burdened with the costs associated therewith.

This is a case where a substantial part of the relief sought by the applicant was not going to be the subject of factual disputes.

The applicant came to Court to get an Order that the property be sold on agreed terms and that her share was two-thirds and the

respondent's one-third. If she had instituted an action, it might have taken more than two years before she obtained an Order for the sale of the property.

17. Apart from the anti-dissipation interdict, which I will deal with hereunder, the applicant did not in her Notice of Motion seek any relief relating to the matters recorded in paragraphs (b) – (k) and 7 of the agreement of 14 July 2015, Nothing contained in this judgment will prevent any party for instituting separate proceedings to obtain such relief.
 18. I now turn to the anti-dissipation interdict. The effect of the relief sought would prevent the respondent from dealing with his portion of the proceeds of the sale of the property pending the resolution of the dispute between him and the applicant as to the repayment of certain monies allegedly due to her by him.
 19. The applicant contends, in summary, that having been solely responsible for the financing and renovation of the property and based on an agreement that the respondent would reimburse her those costs, it would be just and equitable that the respondent's portion of sale proceeds be held in trust pending resolution of the dispute as to her entitlement to those monies. The contention is based on the averment that the respondent has no substantial investments or assets and no secured monthly income.
 20. In order to succeed in this leg of the application, the applicant has to overcome the following threshold requirements for an anti-dissipation order. The first step is to satisfy the standard requirements for an interim interdict. These requirements are trite and include:
 - 20.1. a prima facie right albeit open to some doubt;
 - 20.2. a well-grounded fear of irreparable harm to the applicant should interim relief be refused and the ultimate relief eventually granted;
 - 20.3. the absence of a satisfactory alternative remedy; and
 - 20.4. the balance of convenience favours the grant of interim relief.
- Myflor Investments (Pty) Ltd v Everett NO and Others 2001 (2) SA 1083 (C) at 1088 E – F. See also Knox D'Arcy Ltd v Jamieson and Others
- [1996] ZASCA 58; 1996 (4) SA 348 (SCA) 373 D where it was held that the requirement of no alternative remedy (in an application for interim relief) does not apply in the case of an anti-dissipation order. The rest of the requirements do apply.
21. The second threshold requirement to be met where the applicant does not have any special claim to the respondent's share of the property, is for the applicant to convince the Court that "the respondent is wasting or secreting assets with the intention of defeating the claims of creditors". See the dictum of Harms ADP (as he then was) in Carmel Trading Co Ltd v Commissioner of South African Revenue Services and Others 2008 (2) SA 433 (SCA) at para 3 where the learned Judge states that "such an order [a preservation and anti-dissipation order], which interdicts a respondent from dissipating assets, is granted in respect of a respondent's property to which the applicant can lay no special claim. To obtain the order the applicant has to satisfy the Court that the respondent is wasting or secreting the assets with the intention of defeating the claims of the creditors. Importantly, the order does not

create a preference for the applicant to the property interdicted". It is common cause that this application is to preserve an asset that is not in issue between the parties and that the applicant does not claim any proprietary or quasi-proprietary right to it. All the applicant desires is to have the monies kept in trust so as to be available to satisfy a debt allegedly owed to her by the respondent.

22. The central issue for determination, given the test for the grant of the order sought in this part of the application, is whether the applicant's founding affidavit makes out a prima facie case with regard to the respondent's intention to secrete or waste his share of the proceeds of the sale of the property so as to frustrate or defeat her claim.
23. The respondent is, on the applicant's version, a man of few means. But, the applicant fails to make out a case that the respondent will secrete his assets once the proceeds of the sale have been paid out to him. The essence of the applicant's case is that it would be just and equitable if those funds are kept in the conveyancer's Trust account until resolution of their dispute so that she could access same when the dispute is resolved. That, however, is not the test for the granting of an anti-dissipation order. Also, the Courts are slow in granting anti-dissipation orders due to the restrictions such orders place on a person's ability to deal with his or her assets as he or she wishes.
24. Viewed as a whole, I do not consider that the allegations in the founding affidavit are such that a reasonable person would conclude that the respondent intends to secrete or waste his funds in order to defeat the applicant's claim. The prayer for an anti-dissipation interdict therefore falls to be dismissed.
25. It is appropriate to now turn to the respondent's counter-application. Should the Chamber Book Order of 29 August 2016 be rescinded? The background to the grant of the aforesaid Order, in summary, is the following: The respondent served and filed a Notice to Oppose this application on or about 25 June 2016 together with a Rule 35 notice calling on the applicant to produce various documents which he required for purposes of drafting the answering affidavit. Then, when no response was forthcoming, the respondent served a Rule 30A notice on the applicant calling for compliance with the Rule 35 notice. Applicant's response was delivered on 21 July 2016. The applicant only produced one of the approximately thirteen documents requested, stating, inter alia, that the rest of the documents sought were not necessary for purposes of drafting the answering affidavit. The respondent's

response to this was that the applicant was compelled to deliver all the documents sought and that the threatened Chamber Book application would be opposed. Notwithstanding this, the applicant on 25 August 2016 served a Chamber Book application on the respondent seeking an order compelling the delivery of the answering affidavit. The respondent duly served, within the time limits set by the Rules, a notice opposing that application on 30 August 2016. However, unbeknown to the respondent, and in contravention of Rule 6(5)(b) which sets out a period of five days before an application may be heard on an unopposed basis, the applicant irregularly was granted an order compelling the delivery of the answering affidavit on 29 August 2016, two days

after service and filing of the Chamber Book application. The grant of that Order was irregular. I find that the Chamber Book Order should be rescinded as, not only was the application opposed but the order was granted prematurely. The rescission application therefore succeeds.

26. The second leg of the respondent's counter-application is that the relief sought in paragraphs 2.5, 2.6 and 2.8 above should be struck out. I have already found that there no case was made out for the relief prayed for in paragraphs 2.5 and 2.6 above. All that remains, is for me consider whether there is merit to the respondent's contention that the applicant is not entitled to the costs order sought by her.
27. The instances where the Courts have mulched a party with a punitive costs order are trite and it is unnecessary to repeat same here. See the leading authority on the circumstances in which attorney and client costs may be awarded AC Cilliers Law of Costs published by LexisNexis Service Issue 33 dated April 2016.
28. Punitive cost orders are only granted in limited instances. It is manifest from the papers that the relationship between the

protagonists in this matter is, to put it generously, unsound. This might be the cause for this matter having reached this stage when, in my view, it should have settled a while back, had cooler heads prevailed. Be that as it may, I have found no evidence in the papers that the respondent's actions, in either defending the main application or in bringing the counter application, were vexatious, frivolous or met the other tests which would have justified me granting the relief sought by the applicant.

Consequently, the prayer for a punitive cost order against the respondent fails. I also find that a punitive cost order against the applicant is not warranted for the same reasons. Regarding the issue of costs in general, the applicant, who in the main, brought this application to achieve a termination of the joint ownership, has succeeded in that regard. The respondent

succeeded in his opposition to three of the orders sought by the applicant and in respect of the Chamber Book application.

However, it was only in the answering affidavit that the respondent consented to the relief sought in respect of the termination of the joint ownership. I therefore think that an appropriate costs order would be for each party to pay his or her own costs up to the date of the delivery of the answering affidavit. The applicant must pay the respondent's costs after that date.

29. I foresee certain practical difficulties in the implementation of some of the orders that the parties are in agreement with. The

issues

highlighted hereunder are not clear from the papers nor was sufficient light shed on them during argument.

30. How can I grant an order that the property must be sold within 60 days? Against whom should that order be made? Who will be guilty of contempt of Court if the property is not sold in 60 days? Who will arrange the sale? Who arranges and determines the conditions of sale? If an estate agent gets involved, who determines her commission and who will be the conveyancer to affect transfer? These are issues that are not canvassed in the papers nor were they raised and ventilated during argument. In view of the discretion given to me by the prayer for 'further alternative relief', I have attempted in my Order hereunder, to give practical effect to the relief sought.

31. In the light of the above, I make the following order:

[1]. The joint ownership of the parties in the immovable property known as Erf [...] Pinelands, known as [...], Pinelands shall be terminated.

[2]. The respondent must, within 30 (thirty) days of this order, obtain a valuation of the property from a registered valuer of his choice and make it available to the applicant.

[3]. If the applicant agrees with the valuation, the amount thereof shall, for purposes of this order, be deemed to be the market value of the property.

[4]. If the applicant disagrees with the valuation then the average of the valuation obtained by her on 7 June 2016 and the one to be obtained in terms of paragraph [2] above shall, for purposes of this order, be deemed to be the market value of the property.

[5]. The applicant may, within 10 (ten) days after the market value of the property has been determined as set out above, inform the respondent that she intends to purchase his undivided third share in the property for an amount equal to one third of the market value thereof, the full purchase price to be payable against registration of the undivided one third share into her name.

[6]. The respondent, being the seller of the one third undivided share, shall nominate a conveyancer to draw up the required documentation (including a deed of sale) and to register the one third share into the name of the applicant. The applicant shall, if applicable, obtain a release of the respondent from all obligations he may have under the First National Bank bond over the property, so as to enable the one third share to be transferred to the applicant. The applicant shall pay the transfer costs and related charges, including transfer duty.

[7]. If the applicant does not inform the respondent, within the ten day period set forth in paragraph [5] above that she intends to purchase his undivided third share in the property, she shall place it on the open market (using the services of an estate agent, should she so choose). If a bona fide purchaser is found who is prepared to buy the property in a cash transaction at a price of not less than its market value, she shall nominate a conveyancer to draw up the required documentation (including a deed of sale) and to register the property into the name of the bona fide purchaser. The bona fide purchaser shall pay the transfer costs and related charges, including transfer duty.

[8]. The respondent must sign all documents necessary to implement the sale and transfer of the property to the bona fide purchaser.

[9]. The applicant is responsible for payment of the full amount outstanding under the bond on the property to allow the property to be transferred to the bona fide purchaser.

[10]. All costs relating to the marketing of the property (if any) and to the implementation of the sale, including, but without limitation, estate agent's commission and the costs of obtaining an entomologist's, an electrician's, a gas and/or beetle certificates, outstanding rates, taxes, utility bills and such like shall be borne as follows:

- two thirds thereof by the applicant; and
- one third thereof by the respondent

and shall be paid by each of the parties to the conveyancers on being presented with a statement of account or other proof of the amount due prior to the registration of the transfer of the property.

[11]. Any party may on the same papers, amplified as may be necessary, approach the Court for further directions.

[12]. The applicant's prayer that she is entitled to two-thirds of the sale proceeds after deduction of the costs set out in [10] above succeeds.

[13]. The applicant's prayer that the respondent's one third share of the sale proceeds to be held in Trust pending the resolution of the dispute between the parties is dismissed.

[14]. The applicant's prayer that she be awarded costs on an attorney and client scale is dismissed.

[15]. The Chamber Book Order granted on 29 August 2010 is hereby rescinded.

[16]. Each party shall bear his or her costs of this application up to the date of the delivery of the respondent's answering affidavit, whereafter the applicant shall pay the respondent's costs in this application, taxed on a party and party scale. The applicant shall pay the respondent's costs in respect of his counter-application..

CANCA, AJ

Appearances

For the Applicant : Adv T Smit

Instructed by

: Wolpe and Associates

Cape Town

For the Respondent : Dr LJ van Rensburg

Instructed by

: Van Rensburg & Co.

Bergvliet, Cape Town

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