

SOUTH AFRICA / JUDGMENT

Moreira v Moreira (59409/2014) [2015] ZAGPPHC 691 (6 October 2015) [2015] ZAGPPHC 691

COURT

North Gauteng High Court, Pretoria

BEFORE

Holland-Müter

CASE / FILE NUMBER

59409/2014

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No: 59409 / 2014

DATE:

6/10/2015

Before:

The Honourable Holland-Müter AJ.
In

the matter between:

RICARDO
MANUEL SAMPAIO MOREIRA
Plaintiff/ Respondent
and
GINA
MOREIRA (Born
FERREIRA)
Defendant/Applicant

JUDGMENT

[1] The matter was heard on Friday 25 September 2015 in the urgent court. The matter was set down for Tuesday 22 September 2015, but due to the volume of the papers, the parties requested the matter to stand down to the 25th to enable the parties to indicate to myself as to the relevant pages and what could be excluded. The pages exceeded the norm of 500 pages if all the annexures, and in particular the report in annexure “Y” be accounted for. The pages necessary to prepare was approximate 220 pages.

[2] The applicant moves for the following relief:

That the division of the accrual between the parties be determined immediately, or on such other basis as the Court may deem just; (the relief claimed is colored in terms of the provisions of the Matrimonial Property Act, hereafter referred to as the ‘act’). That the proceeds (capital) of the sale of the property in question be payed into the trust account of the applicant’s attorney pending the determination of the divorce between the parties; That the respondent furnish the applicant with particulars of the value of his estate within seven (7) days as from date of the court order;

That the respondent furnish the applicant with all supporting documentation reflecting the value of the assets comprising the

estate of the respondent referred to above (a long list of documents etc are listed); That the respondent pay the costs of the application on an attorney and client scale. (for purposes of the judgment I did not repeat the prayers in full as prayed for).

[3] The respondent opposed the application. The respondent inter alia in his par 15 on p 156 contended that the application was not urgent.

[4] Both counsel provided me with comprehensive heads of argument for which I am indebted.

[5] After hearing the arguments, I reserved judgment.

[6] The divorce matter has been enrolled for 13 May 2016.

[7] Before I deal with the application, a short summary of the proceedings until date hereof follows;

Summons was issued during August 2014. The applicant on 16 October 2014 served a notice in terms of section 7 of the Matrimonial Property Act on the respondent. to date hereof no reply was received, nor was any interim application to compel brought by the applicant. The applicant brought a Rule 43 application during March 2015 and on 16 July 2015 Baqwa J ordered certain monetary relief as to maintenance to be payed by the respondent towards the applicant. Makhafola J, on 29 May 2015 ordered the respondent to within three weeks after the order being granted, deliver certain documents as tendered by the respondent. It is so that the respondent is in default to these orders. The applicant has however not used the appropriate relief available to

her to enforce such non-compliance by the respondent. She now approaches this court on an urgent basis for some of that relief and for an order in terms of section 8 (1) of the act.

- [8] After reading the voluminous application, the relief sought can be summarized to be that the applicant wants a division of the accrual in question the respondent to reply to her section 7 notice and costs of the application.
- [9] It is trite that Rule 6(12)(1), the rule as to the abridging of time limits to bring an application on an urgent basis, is the most abused rule of court. I will deal with this below.
- [10] In compiling the number of pages to be read by myself, the applicant's list excluded pages 342 to 355. These pages inter alia includes annexure 'Y' to the opposing affidavit, as referred to on page 342 in the confirmatory affidavit of Johannes Lodewyk Bouwer. This was referred to as the 'Bouwer report' during arguments. The applicant, in her replying affidavit on page 357 par 3 (in limine) state that the respondent's affidavit must be disregarded entirely. However, in the heads of argument on behalf of the applicant, reliance is done on annexure "Y" to further the argument that the respondent is dissipating his estate. The

applicant cannot have it both ways.

- [11] In order to determine whether the applicant is indeed urgent, the merits need be examined by myself because the merits and urgency are closely interlinked in this application. I have to be satisfied that there are merits or sufficient reasons for, if I may call it, 'jumping the queue' by the applicant for the relief requested on an urgent basis and that there are reasons why she cannot wait in the queue to have the matter heard.
- [12] The applicant's main contention as to why she is entitled to the relief claimed is that the respondent's actions is intended to dissipate his estate to her detriment in that her right to share in the accrual will be affected. See her par 36.5 on p 22-23. The sale of the property referred to in the letter by the respondent's attorney, as annexed on p 62-63, is the only transaction the applicant avers that will have the effect to dissipate the estate. The rest of her argument is that the respondent failed to comply with court orders or to honour undertakings made by or on his behalf.

- [13] If the contents of the letter on p 63 is viewed, the following is mentioned:

The respondent intends to pay various contractors for services rendered to the property. This is in the ordinary scope of business and cannot be said to dissipate the estate. He intends repaying a loan towards his mother. This in my view is not unusual and does not amounts to dissipating the estate. His intention to pay his maintenance in terms of the court order is not intended to dissipate the estate. To utilize some of the monies for his own living expenses is similar not a dissipation of the estate To provide for his own legal costs in my view is in the ordinary scope of living. He has to make a contribution towards he applicant's

legal costs as ordered in the Rule 43 order. This can not be held to dissipate the estate.

This, being the main complaint by the applicant, cannot be held as intended to dissipate the estate to the detriment of the applicant.

- [14] She has other remedies to enforce the Rule 43 order and the non-compliance of the notice in terms of section 7 of the act. The fact that the respondent contradicts himself and was criticized by Baqwa J in the previous hearing does not make out good cause to the relief such as envisaged in section 8 (1) of the act.
- [15] The conduct of the respondent, as questionable as may be, is not the yard-stick when deciding to grant the relief sought.
- [16] The applicant, on the one hand wants the court to exclude the 'Bouwer report', but on the other hand use the report to calculate the value of the respondent's estate. She cannot have it both ways.
- [17] Turning to the provisions of section 8 (1) of the act, the following has to be clear before an order in terms of the section can be granted:

The court has to satisfied that the conduct in question will probably seriously prejudice the other spouse. It cannot be said that the single transaction relied upon will have such effect. There is no indication that the conduct will prejudice other persons, safe to say that the creditors of the respondent may be prejudiced by such an order at this time. The relief requested will only be granted in the 'clearest case' . The applicant's right to share is acquired on dissolution of the marriage. Before then the applicant only has a contingent right to claim and that right will only materialize at divorce. See *RS v MS* 2014 (2) SA 511 GS par 29-31. In *JA v DA* 2014 (6) SA 233 GJ it was held that section 8 (1) of the act creates an extraordinary remedy and that the scope of the remedies to protect the contingent right in a narrow sense because of the conditions that must be met.

- [18] It must be remembered that a spouse's right to share in any accrual as envisaged in the act arises when the marriage is dissolved and not at any earlier stage (section 3 of the act), subject to the powers of the court to order a division at an earlier stage in terms of section 8(1) of the act. See *Reeder v Softline Ltd and Another* 2001 (2) SA 844 W 851 - 852.
- [19] The beneficiary spouse must show absence of prejudice to third parties and that the alienator spouse's conduct will probably seriously be prejudicial towards the applicant spouse. On a balance of probabilities I cannot find in favour of the applicant on the evidence before myself.
- [20] The applicant spouse may have at least two other possible remedies when fearing that her contingent right may be negatively affected, being that she may apply for an interdict pendente lite or apply for the other spouse to be declared a prodigal. *Reeder supra* 851-852. The contingent right may be protected by interdict if a proper case is made out (my underlining).
- [21] The requirements for an interim interdict is trite, it can be summarized as follows:

A prima facie right (in this matter the applicant has a contingent right as explained above in RS v MS; JA v DA & MB v MB). A well-grounded apprehension of irreparable harm, pending the outcome of the final hearing in 2016. I am not convinced that such apprehension is present, there is only one transaction on the table being complained about, that transaction in my view not out of the normal. But for the single transaction complained about, there is no evidence of assets being secreted with the intention to dissipate the applicant's claim. No exceptional circumstances exists to warrant an interim interdict. Knox D'Arcy and Others v Jamieson and Others [1996] ZASCA 58; 1996 (4) SA 348 AA at 373 G-H and 377 B-278 I. The conduct of the respondent complained about in my view is not sufficient to grant this narrow relief. I cannot find that the balance of convenience favours the applicant as explained supra. What is to happen is not extraordinary, the opposite can be prejudicial to other parties. I have already mentioned that the applicant indeed has other remedies at her disposal to enforce her rights with regard to the Rule 43 order and the Notice in terms of section 7 of the act. She may even have an interim interdict if a proper case is made out.

- [23] Before granting an order in terms of section 8(1) of the act, the court must be satisfied that there is indeed an accrual to be divided. If, as argued in the replying affidavit, the 'Bouwer report' is ignored, no evidence of substance is before me to decide that there is indeed an accrual to be divided. There is no evidence on behalf of the applicant what her position is, and in view of the starting values of the parties in the ante nuptial agreement, some calculation needs to be done, that not possible on the scant evidence before me.
- [24] A tender with prejudice was filed before the hearing. In this render the applicant makes certain proposals as to the appointment of a referee, the powers of the referee etc. This tender is indirectly an effort to obtain the relief which should in my view be sought by compelling the respondent to reply to the outstanding Notice in terms of section 7 of the act. I do not think it can be done in this way.
- [25] The relief in prayer 3 of the notice of motion will result that the full capital of the sale of the property be placed in trust, depriving the respondent to carry on with his making of a living in the ordinary way. It is not the purpose of section 8(1) to order such wide relief. In JA v DA supra, it was held that this relief should be narrow and in exceptional cases. I am not convinced that the applicant has succeeded to prima facie show that she is entitled to the relief claimed.
- [25] The question of costs is discretionary. The court will take into account various factors and after considering such, rule on costs. This is an interim relief. The conduct of the parties need accounted for. The respondent is in default with his promises, in contempt of the Rule 43 order and vague on his position. The applicant however did not make use of the remedies available to her but chose to 'use' the 'abused' rule in the urgent court. I need not remind the parties as to the directive by Southwood J on 30 November 2006 as to the abuse of Luna Meubel Vervaardiger (Edms) Bpk v Makin and Another 1977 94) SA 135 W at 136 G-H.

- [26] I am of the opinion that, in view of the applicant coming to the urgent court under the circumstances, as well as the conduct of the respondent being in contempt of the Rule 43 order, the correct cost order would be costs in the main action. I could have struck the application for lack of urgency with the normal adverse costs order, but deem it fit to order the costs to be in the main action. Both parties filed unnecessary papers and annexures as to the Rule 43 and other papers, burdening the urgent court with voluminous papers beyond the ordinary. The sizing down of the papers were of little assistance under the circumstances.
- [27] The following order is made: The application is dismissed, the costs to be costs in the main application.
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HOLLAND-MÜTER AJ

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Prepared on 10 October 2026 · Esheria