

SOUTH AFRICA / JUDGMENT

N.C.M v V.T.M and Another (5403/2016) [2017] ZAECHGC 75 (20 June 2017)

[2017] ZAECHGC 75

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

5403/2016

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION,

GRAHAMSTOWN

CASE

NO. 5403/2016

In

the matter between:

N.

C.

M.

Applicant

and

V.

T.

M.

First Respondent

EVERGREEN

PROVIDENT FUND, DIVISION OF OLD MUTUAL Second

Respondent

JUDGMENT

Bloem J.

- [1] On 21 November 2016 an order was granted ex parte and on an urgent basis in terms whereof a rule nisi was issued calling upon the first respondent to show cause why he should not be interdicted from dissipating assets out of the joint estate and interdicting the second respondent from releasing 50% of the first respondent's pension fund benefits held by the second pending the finalisation of the divorce action and the final division of the joint estate.
- [2] On the return day on 13 December 2016 the rule nisi was extended to 2 March 2017. The first respondent delivered his answering affidavits on 20 January 2017. On 2 March 2017 the rule nisi was further extended to 9 March 2017. Another rule nisi was issued calling upon the applicant to show cause on 9 March 2017 why the application should not be dismissed and why she should not be ordered to pay the costs of the application, including all reserved costs, out of her half of the joint estate, after division thereof. On 9 March 2017 the application was further postponed to 25 April 2017. On the latter date counsel for the parties agreed that the matter be postponed to 15 June 2017, that the rules nisi be extended accordingly and that the applicant deliver her replying affidavit and heads of argument on 26 May 2017 and 2 June 2017 respectively. The first respondent had delivered his heads of argument on 23 February 2017. I heard this matter on 15 June 2017 without the applicant having delivered her replying affidavit and heads of argument. There was no explanation for the failure to deliver those documents.
- [3] The applicant and the first respondent are married in community of property which marriage still subsists. The applicant has instituted divorce proceedings against the first respondent which proceedings are pending. The second respondent is a pension and provident fund which holds the applicant's pension fund benefits.
- [4] The applicant seeks an order in the nature of an anti-dissipation order. The effect of such an order, in the form of an interdict, is to prevent a respondent from freely dealing with his own property to which the applicant lays no claim.[1] An applicant needs to show a particular state of mind on the part of the respondent, that is, that he is getting rid of the funds or he is likely to do so, with the intention of defeating creditors' claims. Grosskopf JA said the following at 372H-I in *Knox D'Arcy* about the circumstances under which relief of this nature may be granted:

“Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency.”

- [5] In *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and others*[2] Harms ADP said that an anti-dissipation order:

“...which interdicts a respondent from disposing of or 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 assets with the intention of defeating the claims of creditors. Importantly, the order does not create a preference for the applicant to the property interdicted.”

- [6] Applying the above principles to the facts of this case, the applicant was required to satisfy the court, through credible evidence, that the first respondent was wasting or secreting assets with the intention (particular state of mind) of defeating her claim in the divorce proceedings. It is common cause that the value of the first respondent's pension benefits, held by the second respondent, is approximately one million rand. The evidence upon which the applicant relied is that she “received information that the first respondent is utilising his pension fund monies in an extravagant manner”. The applicant's attorney addressed a letter dated 2 February 2015 to the first respondent's attorney in this regard. It reads as follows:

“We have been instructed by our client that she had been informed by the relatives of our client, that he is currently utilising his Pension Fund monies in an extravagant manner. Our client fears that he has or might utilise the whole of the Provident fund monies (which forms part of the joint estate).

We hereby request that your client kindly furnish us with the necessary proof that he did not utilise said funds, failing which client has no other option than to apply for an anti-dissipation interdict. Thank you”.

- [7] Because there was no response to the letter from the applicant's attorney, she instructed her attorney to address a letter to the second respondent advising it of the pending divorce proceedings and the applicant's “entitlement to 50% of the first respondent's pension fund benefit” and requesting the second respondent to suspend the payment of the pension fund benefits to the first respondent pending the finalisation of the divorce proceedings. The applicant's attorney gave effect to his instructions. Although the second respondent agreed on 22 February 2016 not to make any payment to the first respondent before the finalisation of the divorce proceedings, on 11 November 2016 the second respondent advised the applicant's attorney by email that it could not withhold the first respondent's pension benefit without an interdict and that, unless an interdict be served on it within 48 hours, “we will be paying the member his full retirement benefit”. The applicant's attorney then sought an

undertaking from the first respondent, through his attorney, “that 50% of the pension fund will be placed in an interest bearing account pending the finalisation of the divorce, alternatively retained by the Provident Fund and not to be disposed of by your client”. There was some correspondence between the two attorneys, the upshot thereof being that the first respondent refused to give the undertaking sought by the applicant. The applicant then launched this application.

- [8] It is unnecessary to deal in detail with the allegations contained in the first respondent’s answering affidavit, save to point out that he stated that it was impossible for him to have utilised his pension fund benefits in an extravagant manner in February 2015. The letter from the applicant’s attorney wherein that allegation was made is dated 2 February 2015. It was common cause, certainly as at 11 November 2016, the date when the second respondent sent an email to the applicant’s attorney, that the second respondent had not paid any pension fund benefits to the first respondent. The first respondent accordingly denied that he used or abused his pension fund benefits.
- [9] An analysis of the applicant’s founding affidavit shows that her alleged fear that the first respondent “will dissipate the [pension fund benefits] by using it, spending it recklessly or dissipate or hide same in other ways thereby making it impossible for me to recover same, to my extreme prejudice and his benefit” is based solely on information that she allegedly received from the first respondent’s relatives. There are two problems with that allegation. The first is that the identity of the first respondent’s relatives was not disclosed to enable the first respondent to check with them the accuracy of the information allegedly given by them to the applicant. The second problem is that, in the absence of agreement between the applicant (the person who wanted to introduce the hearsay evidence) and first respondent (the party against whom the hearsay evidence was intended to be adduced), section 3 of the Law of Evidence Amendment Act[3] prohibits the admission of hearsay evidence unless the interests of justice require it.[4] Mr Matyumza, counsel for the applicant, did not submit that it was in the interest of justice that such evidence be admitted. It cannot be in the interest of justice to admit such hearsay evidence because the applicant, who must know the first respondent’s

family members who allegedly gave her the information, did not state the reason why those family members did not give that evidence

themselves.[5]

- [10] In all the circumstances, the hearsay evidence, that the applicant allegedly learned from the first respondent’s family members that he was utilising his pension fund monies in an extravagant manner, is inadmissible as evidence in these proceedings. That being the case, there is not a single fact that the applicant placed before the court to show that the first respondent was getting rid of, or was likely to get rid of, the pension fund benefits with the intention of defeating her claims in the divorce proceedings. That much Mr Matyumza conceded. In the result, the rule nisi that was issued on 21 November 2016 must be

discharged, with costs. On 2 March 2017 the applicant was ordered to show cause on 9 March 2017 why she should not be ordered to pay the costs of the application out of her half of the joint estate in the event of the application being dismissed. She did not deliver an affidavit to show cause and accordingly failed to show why such a costs order should not be made. The rule nisi that was issued on 9 March 2017 must be confirmed.

[11] In the result, it is ordered that:

11.1. the rule nisi issued on 21 November 2016 is discharged;

11.2. the applicant pay the costs of the application, such costs:

11.2.1. to include costs previously reserved; and

11.2.2. to be paid out of the applicant's half of the joint estate, after division of such joint estate.

G H BLOEM

Judge of the High Court

For the applicant:

Adv M Matyumza, instructed by Caps Pangwa & Associates, Grahamstown.

For the first respondent:

Adv S H Cole, instructed by Mbambo Attorneys, Queenstown and Mili Attorneys, Grahamstown.

For the second respondent: No appearance.

Date of hearing:

15 June 2017.

Date of delivery of the judgment: 20 June 2017.

[1] Knox D'Arcy Ltd and others v Jamieson and others

[1996] ZASCA 58; 1996 (4) SA 348 (AD) at 372G-H.

[2] Carmel Trading Co Ltd v Commissioner, South African Revenue Service and others 2008 (2) SA 433 (SCA) at 435C-D.

[3] Law of Evidence Amendment Act, 1988 (Act No. 45 of 1988).

[4] Ndlovu and others v S

[2002] 3 All SA 760 (SCA) at 766d.

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- [5] Section 3 (1) (c) (v) of the Law of Amendment Act requires the court to have regard to the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends.
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