

SOUTH AFRICA / JUDGMENT

R.M v L.M and Others (9727/2013) [2013] ZAKZDHC 49 (23 September 2013)

[2013] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Thatcher AJ

CASE / FILE NUMBER

9727/2013

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IN

**THE KWAZULU-NATAL HIGH COURT,
REPUBLIC
OF SOUTH AFRICA**

CASE

NO: 9727/2013

In

the matter between:

R
M
Applicant
and
L
M
First
Respondent
CORPCLO
841 CC
Second
Respondent
MOONEY
FORD ATTORNEYS
Third

Respondent

JUDGMENT

THATCHER AJ

- [1] The applicant and the first respondent, who reside in Durban, have been married for many years. Some years ago, while they were married, the applicant had purchased a flat in Cape Town. He caused the flat to be registered in the name of the second respondent, and the members' interest therein to be registered in the names of their three children. Those children are now adults. The applicant's mother had lived in the flat until she passed away approximately two years ago. After her death, the applicant had let the flat.
- [2] The applicant and the first respondent now wish to be divorced and a divorce action is pending. They have in the meanwhile had discussions in an attempt to settle the proprietary consequences of the divorce. During these discussions, the first respondent expressed the wish to vacate the matrimonial home in Durban and to purchase a property for herself and the applicant resolved to sell the flat in Cape Town. He has now done so, and it was transferred from the second respondent on the 8th August 2013. On the 17th April 2013, the first respondent concluded a contract to purchase a flat in a sectional title scheme known as Farrington in Durban ("the Farrington property"). In terms of that contract, R2 691 000.00, the balance of the purchase price (a deposit of R137 500.00 already having been paid) was to have been secured by the 10th August 2013. The occupation date was the date of registration of transfer which was to be the 31st August 2013 or as soon as possible thereafter.
- [3] The balance of the purchase price has not been secured as a dispute has arisen as to who is to pay it. The third respondent, the conveyancers nominated to attend to the transfer of the Farrington property, hold in trust the sum of R2 877 836.61. This amount is the proceeds of the sale of a flat in Cape Town. The applicant says that he told the first respondent that he was prepared to sell the flat in Cape Town and make available the balance of the proceeds of its sale towards the purchase of the Farrington property, but only after the second respondent's liabilities (which he says are his loan account and obligations to SARS) have been settled. These obligations total R1 333 614.45.
- [4] He contends, moreover, that this was simply part of the discussions they had towards reaching an overall settlement of the divorce action and was not to be a binding contract operating independently of an overall divorce settlement agreement. However, he is willing to make available the nett proceeds of the sale of the Cape Town flat (which I calculate to be R1 544 222.16)

towards the balance of the purchase price of the Farringdon property. The first respondent, on the other hand, contends that the applicant agreed to make available the entire proceeds of the sale of the Cape Town property and that that agreement was to operate notwithstanding that no overall divorce settlement had been concluded.

- [5] This dispute caused the applicant to launch, as a matter of urgency, on the 3rd September 2013, an application for an order that, pending the institution of an action to be brought by the applicant for, inter alia, an order directing the second respondent:-
- (a) to pay to the applicant R990 250.00 (the alleged amount of his loan account);
 - (b) to use the proceeds of the sale of the Cape Town flat, currently held in trust with the third respondent, to discharge the second respondent's debt to the applicant of R990 250.00 and to pay the second respondent's liabilities to SARS, the third respondent be interdicted and restrained from paying out the sum of R1 333 614.45.
- [6] If this application is granted, the first respondent will be unable to pay the balance of the purchase price in its entirety, and she will be in breach of the sale contract.
- [7] Mr Crowe SC, who appeared for the first and second respondents, raised two points in limine. Firstly, he contended, no grounds of urgency had been made out, and in any event any urgency which may exist was self-created, the applicant having delayed for some three weeks before bringing the application. Secondly, he contended, the application was fatally defective because there had been no proper joinder of the seller of the Farringdon property who was an interested party in the application. He submitted that the applicant's endeavour to join the seller, Mr Jacobson, at the commencement of the hearing was not a proper joinder as it provided no real opportunity to the seller to intervene in the application the outcome of which may be to his prejudice.
- [8] Dealing with the question of urgency, in my view the matter is urgent. In particular, from Mr Jacobson's and the first respondent's point of view, the application should be determined as soon as possible. And the applicant, having brought the application as a matter of urgency, presumably wishes it to be determined as soon as possible as well. It is thus in no one's interests that the application not be determined. I did not understand Mr Crowe to contend that the first and second respondents were in any way irreparably prejudiced by the manner in which the application had been brought. There is therefore no purpose in not determining the application, and I will do so. Ideally I would have liked more time to prepare this judgment, but the parties wish for a ruling before the end of the day on the 23rd September 2013, and I do not wish to make a ruling without providing

reasons.

- [9] Insofar as the non-joinder point is concerned, the application concerns a dispute between the applicant and the first respondent arising from the latter's obligation to fulfil her obligation in terms of a contract which she has with Mr Jacobson. Whether the application

is resolved in favour of the applicant or the first respondent is, from Mr Jacobson's point of view, irrelevant. Mr Jacobson has the right in terms of the contract to place the first respondent in mora to perform her obligations, which right he has irrespective of the outcome of the application. I am advised that he has been given notice of the application. He is thus in a position to decide upon his course of action, taking into account the application and its outcome. Therefore, the failure at the outset to join Mr Jacobson as a respondent in the application is not fatal and is no obstacle to my determining the application.

[10] I turn now to consider the application. In doing so, I shall apply the test set out by Holmes, J (as he then was) in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at page 383C-G.

The Applicant's prospects of ultimate success in the envisaged action

[11] It is common cause that the parties discussed the overall settlement of the patrimonial consequences of the divorce and in the course of those discussions the first respondent expressed the desire to purchase a property in which to live. The applicant states as follows in his founding affidavit:-

"13.

I told the first respondent that in relation to that aspect I was happy to agree that the property in Cape Town be sold, and that the proceeds of the sale, obviously after discharge of all the [second respondent's] liabilities, be utilised for the purpose of buying a new property for the first respondent.

14.

Although it was my understanding that this agreement was only part of the overall attempts to settle the divorce in its entirety and not an independent agreement to operate independently of an overall settlement, I am willing to abide what (sic) we discussed.

15.

Our children were told that I had agreed to dispose of the immovable property in Cape Town and to use the abovementioned nett proceeds towards the acquisition of the new property for the first respondent. The first respondent will allege that I also undertook to pay the shortfall between those proceeds and the amount required to purchase the property. I immediately concede that this was discussed although it was never intended by me, nor understood by the first respondent, that she could enforce that part of our discussion without the divorce being settled in its entirety. In other words the discussion on my part to fund the shortfall was part of an overall settlement, and to date we have been unable to reach consensus, although we are still making attempts to do so. I am therefore under no obligation to fund any shortfall.

...

20.

My agreement that the [second respondent] will sell the immovable property in Cape Town, and that the funds will be used for the acquisition of the new property, was always on the basis that the [second respondent's] debts would be discharged first, and that the available proceeds would be those nett of those obligations.

22.

In the meantime the first respondent has signed a purchase and sale agreement of a new property of her choice, and she is looking to me for the proceeds from the sale of the Cape Town property, and she is also looking to me to pay for the balance of the purchase price, plus alterations and various new appliances, whatever the shortfall."

- [12] The first respondent, in answer to the allegation that the agreement was that the funds to be used for the purchase of the new property was always on the basis that the second respondent's debts would be discharged first, avers (at paragraph 20.2) that she would never have committed to the purchase of the Farringdon property if those allegations were correct. In support of this she refers to an email, annexure "J1" to which I will refer later in this judgment. The first respondent alleges (in paragraph 22.1) that she signed the Farringdon sale agreement after the applicant had agreed to the terms upon which she would conclude that purchase, and subject to the condition that she would resign as a trustee of his family trust, which she has done.
- [13] In reply, the applicant does not dispute that the first respondent recorded that as far as she was concerned the purchase would not be contingent on an overall divorce settlement. Indeed he cannot do so because the first respondent stated as much in an email to which I will also refer later in this judgment. He denies however that this was his attitude. He maintained his stance that they had never reached final consensus on the divorce settlement and that the Farringdon purchase was part of that intended settlement.
- [14] In evaluating the parties' respective versions, it is appropriate to examine what the parties actually said at the time in emails shortly before and after the conclusion of the contract for the purchase of the Farringdon property.
- [15] The first relevant email is annexure "J1" to the answering affidavit. It was sent by the first respondent to the applicant on the 10th April 2013. The contents of that email indicate that at this time, a decision had been taken to sell the flat in Cape Town and the first respondent had found a flat, the Farringdon property, which she thought was suitable. She had apparently told the applicant of it and the applicant had put questions to her about it. The email is as follows:-

"Dear R.

In answer to your various questions about the Farringdon flat I have done some further investigation and have been able to find out the following:-

- the asking price is R2.995 million. ...

- levies and rates together are around R5,000 per month ...
- on top of this would be: transfer duties which I believe would be around R160,000 ... and the costs of refurbishment and curtains, carpets etc I have taken Mario there and asked him for a guestimate which was between R200,000 and R250,000"

There followed estimated costs of re-carpeting and items of pieces of work to be done in the kitchen and bathrooms. Thereafter she stated as follows:-

"There are some things – small – that I have not looked at properly eg some taps may need to be replaced ... but this I will do later as it does not constitute repairs or renovation.

Is there anything else you would like to know? ...

Finally while we both agree that the Farringdon flat would be ideal, this decision cannot be contingent on my acceptance of your overall settlement offer as you know that I don't think that it is sufficient to maintain my standard of living (particularly if I am to bear the rates and levies on the flat) and still have no idea whether what is wanted is within your assets and my legal rights. So if we did go ahead with this now it would have to be an interim step and the overall settlement would still need to be negotiated / agreed. I do think though that my overall needs should be significantly reduced living in a flat (compared to the house) and so hopefully it will be easier to negotiate a final settlement on this basis.

Please let me know how you want to go forward.

I really appreciate your trying to help me.

Yours sincerely

L"

[16] On the following day, the applicant replied by way of an email (annexure "J2") as follows:-

"Subject: Re: Farringdon

Thanks for the info. As I have said before I don't care in whose name you put it in and as you have a string of advisers more knowledgeable than I. ...

Are all those figures thumb suck or have you had actual quotes, because once I agree, I will not increase any amounts. ...

One aspect is NOT NEGOTIABLE is that you must resign as a trustee of my trust. ...

I really don't think you need to get the carpets through Mario, we have done well in the past with buying direct from the carpet companies. What would your plumber charge to replace baths, or will that mean replacing tiles. I have seen Bathroom Doctor's work on fixing baths and it is good, not sure who you got quotes from.

If the taps are cr...y you should think of changing them while the workers are there.

Once you have confirmed all the figures and let me know what you intend to offer I will give you the go ahead."

[17] Five days later, on the 16th April 2013, the first respondent signed an offer to buy the Farringdon property. One can only conclude that the first respondent did revert to the applicant with the figures and what she intended to offer, and that these met with the applicant's approval.

I say so because there is nothing to indicate that in the months that followed, the applicant raised any objection to her concluding the contract.

[18] Subsequently, on the 2nd June 2013, the applicant sent an email to one Geert-Jan Nijhuis, an accountant at PKF Durban Incorporated, a firm of chartered

accountants. Mr Nijhuis was obviously familiar with the applicant's tax affairs. That email is as follows:-

"Dear Gerry

The Cape Town flat owned by [the second respondent] went on the market on Tuesday and I accepted R3,050,000.00 on Friday. ...

Can you give me an estimate of the CGT, and any other amounts that I may have to pay, so I can plan how much I will need to fund L's flat in Durban. I know you are working on the balance sheet at present. ...

R"

[19] If the applicant is correct that there was an agreement that he would make the proceeds of the sale of the Cape Town flat, after the discharge of the second respondent's liabilities, available to buy the Farringdon property, one must ask, firstly, why he would need to know from Mr Nijhuis what the nett proceeds of the sale of the Cape Town flat are, and secondly, what he meant when he said he needs to know "so I can plan how much I will need to furnish L's flat." He would only have to know what the nett proceeds are if he had agreed to make up the shortfall between the balance of the purchase price and the nett proceeds from the sale of the Cape Town flat. In the email of the 2nd June 2013, he seeks this information. The seeking of this information by the applicant is inconsistent with his version that

the agreement was that he simply had to make available the nett proceeds of the sale of the Cape Town property.

[20] There is a further series of emails which are significant, and those are the emails marked "F1" to "F3" which appear at pages 73 and 74 of the papers. On the 10th June 2013, the first respondent sent the applicant an email in which she discusses what she may wish to take from the house by way of furniture and fittings. She then goes on to state as follows:-

"I am sure we can resolve the finances amicably without having to go the litigation route and thanks for your promise of payment for the stove. I am getting formal quotes for other expenses that you said you would meet. I assure you that no aggressive lawyer's letters are on the cards. Hopefully once I have settled in Farringdon we will be able to get a realistic handle on my needs and hopefully we will be able to reach an amicable arrangement without the intervention of lawyers."

Here again the first respondent is repeating the notion expressed in her email, "J1", that the purchase by her of the Farringdon property will make it possible to estimate with more accuracy her living expenses so that an overall divorce settlement may be reached. I will deal with the significance of this later.

[21] On the 12th June 2013, the applicant sent an email to the first respondent. While it is not obvious that this email is a response to the one from the first respondent on the 10th June 2013, it does not express any disagreement with the contents of that email. It certainly does not express the view that the contract for the purchase of the Farringdon property should not have occurred or proceed as there had been no overall divorce settlement.

[22] On the same day, at 12.54pm, the parties' daughter, one L F, an attorney practising in Cape Town, sent an email to the applicant as follows:-

"Hi Dad this issue around the CC seems to be really bothering you. We absolutely have no ulterior motives (and certainly no one had thought that by retaining Farringdon in the CC would have any impact on whether or not you were liable for rates and levies etc) – our approach was simplicity and the desire to avoid initial costs.

If what you are saying is that you will declare the dividend arising on the sale of Ma's flat, distribute it to us 3 children (as is required in law), pay the dividends withholding tax and then arrange for us 3 children to lend the dividend on to Mom to enable her to part pay the purchase price for Farringdon and make up any shortfall on the purchase on Farringdon and then pay all the CGT and costs of winding up the CC, then by all means I am happy to chat to Louis Simon [the conveyancer attending to the transfer] to see if he can arrange for the transfer to be effected to Mom directly and not to the CC. Is that what you have in mind?

Please let us know so that I can deal with Louis as soon as possible.

Thanks

(My underlining)

[23] At 3.03pm on the same day, the applicant replied as follows:-

"Of course that is what I have been saying all along."

- [24] The contents of the applicant's email cannot be reconciled with his contention that an agreement subsisted in terms of which he is obliged to make available only the nett proceeds of the sale of the Cape Town property (after repayment of his loan account and the amounts due to SARS) for the acquisition of the Farringdon property and that he has no obligation to fund any shortfall between the balance of the purchase price on the Farringdon property and the nett proceeds of the sale of the Cape Town property.
- [25] I have a further difficulty with the notion that such an agreement was concluded. It is that he alleges the conclusion of an agreement without any reference to the time when it was concluded or where it was concluded. In this regard I refer to the last sentence in paragraph 13 of his founding affidavit where he states as follows:-

"I told the first respondent that in relation to that aspect I was happy to agree that the property in Cape Town be sold, and that the proceeds of the sale, obviously after discharge of all the [second respondent's] liabilities, be utilised for the purpose of buying a new property for the first respondent."

He also does not disclose the first respondent's reaction to this and nor does he explain why it was obvious to her that what would be available would be the nett proceeds.

- [26] Mr Stokes argued that it was highly unlikely that the applicant would settle a part of the divorce by agreeing to finance the purchase of a property for the first respondent while leaving her to mount a further claim against his estate without taking into consideration what she had already received in partial settlement. In this regard, Mr Stokes advised that in the divorce action, the first respondent had made a claim in terms of section 7(3) of the Divorce Act, No. 70 of 1979, which empowers a court granting a decree of divorce to order one party to transfer assets or parts of assets to another party.

(I interpose to state that this does not appear from the papers before me. Mr Stokes advised me of this and assured me that

this was the case, his instructing attorney in this application being the applicant's attorney in the divorce trial. Mr Crowe

declined to place any reliance upon this. I am of the view that I may have regard to this notwithstanding that it does not form part of the papers.)

- [27] It is clear however, that the first respondent does not view the purchase of the Farringdon property as being irrelevant to her proprietary claim in the divorce action. She accepts that the Farringdon property purchase will have an influence on the terms of any future settlement or proprietary claim. Mr Crowe also submitted that the purchase of the Farringdon property was not aside from or irrelevant to the claim in the divorce action.

- [28] The first respondent's view is expressed on two occasions, in writing, in her emails I have referred to. In those she made the point that if she purchased the Farringdon property, it would resolve the question of her future accommodation whereafter the parties would be better placed to estimate her living expenses, thereby making it easier to achieve an overall divorce settlement. This is logical.
- [29] When a court is asked to make an order transferring assets from one party to another, in terms of section 7(5) of the Divorce Act, it may take into account, inter alia, the existing means and obligations of the parties, and "any other factor which should in the opinion of the court be taken into account". I have no doubt that the court hearing the divorce action would regard it as highly relevant the fact that the first respondent had taken transfer of a flat in which she intended to stay after the divorce, particularly when it is clear from the papers in the application that the parties would not regard the value of the Farringdon property as being a trivial part of the applicant's estate. Thus I do not share Mr Stokes' view that the agreement contended for by the first respondent is improbable.
- [30] In summary, the right contended for by the applicant is by no means clear and is open to considerable doubt. Nevertheless, the applicant may still be entitled to the protection of an interdict if he has a well grounded apprehension of irreparable harm and the balance of convenience is in favour of his being granted interim relief.

The balance of convenience and irreparable harm

- [31] The applicant contends that, following the sale of the Cape Town property and the proceeds of the sale of that property being, in broad terms, used to pay the purchase price of the Farringdon property, the second respondent has no assets nor income with which to repay the applicant's loan account, and that he, as the representative tax payer of the second respondent, is exposed to having to pay SARS' dividend tax and capital gains tax as the second respondent will not be in a position to do so. I have some difficulty with this notion. Firstly, Ms F, who is an attorney, denies that the second respondent will be a shell. She is doubtless the source of the instructions to the second respondent's attorney. In a letter from the second respondent's attorney, annexure "D" to the founding affidavit, and written on the 19th August 2013, it is stated that the second respondent will meet its tax obligations to SARS in respect of capital gains tax and dividend tax "as and when they are due for filing and payment". Moreover, Ms F has stated in her affidavit that the second respondent has every intention of complying with its lawful obligations to SARS and to the applicant. Moreover she asserts that there is no danger of the applicant having to liquidate the second respondent as she and her siblings will ensure that the second respondent complies with its lawful obligations. It is therefore difficult to see how the applicant will be irreparably prejudiced given that Ms F has furnished an undertaking that she and her siblings will ensure that the second respondent complies with its lawful obligations, which includes the repayment of the applicant's loan account which she says is repayable on the 1st March 2014.

- [32] In any event, if, contrary to Ms F's assertions, the applicant is obliged to pay the obligations of the second respondent to SARS, I do not believe that he will be irreparably prejudiced thereby. I say so because of the broad discretion which a court has in making an order to transfer assets in terms of section 7(3) of the Divorce Act. The events surrounding the sale of the Cape Town property and the acquisition of the Farringdon property as well as the applicant's relationship to the second respondent and the latter's financial obligations are all highly material in the exercise of the court's discretion whether to distribute assets in terms of section 7(3) of the Divorce Act. Thus any financial loss which the applicant may suffer (and it is by no means certain that he will do so) will be taken into account by the court hearing the claim in terms of section 7(3).
- [33] The applicant's position is to be contrasted with that of the first respondent should the proceeds of the sale of the Cape Town property not be available to pay the balance of the purchase price of the Farringdon property. The first respondent is currently in breach of the sale agreement. Mr Jacobson has the right to place the first respondent in mora, and if she fails to remedy her breach of contract, he has the right to cancel the contract and to sue her for damages. The first respondent has apparently commenced material building works in the Farringdon property and has materially altered its interior.

The applicant is not in a position to dispute these allegations.

- [34] While there is no evidence that the first respondent has or will be placed in mora to perform in terms of the contract, the consequences for the first respondent should Mr Jacobson either demand specific performance from the first respondent or cancel the contract and seek her eviction from the flat which she has begun to renovate, do in my view constitute prejudice to the first respondent which would exceed any prejudice to the applicant if he does not obtain the interdict.
- [35] In the result, the applicant's application for an interdict is refused.
- [36] Insofar as the question of the costs of this application is concerned, after considering the facts of this case I, in the exercise of my discretion, make no order as to costs. The order I make is thus the following:-

The application is dismissed.

Application heard on: 20th September 2013 Counsel for the applicant: A. Stokes SC Instructed by: Shepstone & Wylie Counsel for the first and second respondents M.A. Crowe SC Instructed by: Ashersons

Judgment

handed down on: 23rd September 2013

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