

SOUTH AFRICA / JUDGMENT

R.T.R v D.J.R (37229/2015) [2021] ZAGPPHC 106 (10 February 2021) [2021] ZAGPPHC 106

COURT

North Gauteng High Court, Pretoria

BEFORE

N Davis

CASE / FILE NUMBER

37229/2015

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HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

- (1) REPORTABLE: NO.
- (2) OF INTEREST TO OTHER JUDGES: NO.
- (3) REVISED.

DATE 10 FEBRUARY 2021

CASE NO: 37229/2015

In the matter between:

R[....] T[....] R[....]

Applicant

and

D[....] J[....] R[....]

Respondent

J U D G M E N T

(Contempt of Court, Leave to Appeal and ancillary matters)

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1]

Introduction

1.1 On 23 February 2018, after the conclusion of a trial where evidence had been led in the parties' hotly contested divorce action, which had been raging since its inception three years earlier, this court granted a divorce order. The salient features of that order relevant to these proceedings were the following (for ease of reference and sake of convenience due to the fact that the parties had been plaintiff and defendant, applicant and respondent respectively in various proceedings, they shall be referred to as Mrs and Mr R[...] respectively):

- A decree of divorce was granted;
- In terms of Section 7(1) of the Matrimonial Causes Act of Zimbabwe, Act No 33 of 1985, both parties remained joint owners of a certain immovable property in Maputo, Mozambique (the [...] property) and equally entitled to whatever net rental income the property generates;
- Mr R[...] was ordered to transfer 40% of the shareholding in the [...] Group of companies, including [...] as well as the South African company [...] to Mrs R[...]. This transfer had to take place within 60 days from date of the order, i.e by 24 April 2018;
- Various other distribution orders and declarations about retention of other movable and immovable properties were also made, including an interim maintenance order of R 10 000.00 per month in favour of Mrs R[...].

1.2 There are now, almost three years later, three applications before court:

- Mrs R[...]’s application for contempt of court. She has, to date, not received any rental income from the [...] property, no shares had been transferred to her and Mr R[...] has stopped paying maintenance (the latter only occurred during the course of the present litigation).
- Mr R[...]’s application for leave to appeal, launched on 5 March 2020.
- An application for condonation for the late lodging of the application for leave to appeal.
- Mr R[...]’s counter-application to the contempt application wherein he seeks a variation of the initial order (the variation application).

1.3 The application for leave to appeal and the application for condonation go together and the contempt application and its consequences are related to the variation application. I shall deal with these various applications consecutively in this fashion.

[2] Leave to appeal

2.1 It is trite that the right to appeal is waived if a litigant, by unequivocal conduct inconsistent with the intention to appeal, acquiesces in the judgment. This waiver is also called peremption of the appeal. It does not relate to the grounds of appeal, but to conduct after the appeal. See for example: *Blou v Lampert & Chipkin* 1970 (2) SA 185 (T) at 199A-E.

2.2 From a reading of Mr R[...]'s answering affidavit to the contempt application, there was initially no intention to appeal the order made in the judgment in respect of the [...] property (which he now seeks to claim as his sole property in the variation application). For more than two years after the judgment, he continued to claim that Mrs R[...] was entitled to her half share of the rental income. The reason he could not pay it over to her, according to him, was that she did not have an operative bank account in Mozambique and that he could not expatriate the funds to South Africa. Prior to him citing exchange control restriction as reasons for non-compliance he, on the second working day after the order, forwarded to Mrs R[...] an email wherein he in his own words “restated the whole of the order and I inserted in bold after certain paragraphs thereof my comments and/or what I required from the applicant to be able to comply with the order and/or what steps would be necessary in future to comply with same” (my underlining).

2.3 In similar fashion, Mr R[...]'s initial intention was to comply with the court order regarding the transfer of the shareholding. In fact, he says as much in his aforementioned answering affidavit: “I admit that, in terms of the order, I have to transfer 40% of my shareholding in my businesses in Mozambique to the applicant 60 days from date of the order, including, but not limited to the shareholding in [the Mozambican companies] as well as the South

African company ...” and, with reference of a letter of 27 February 2018 “Israel Casimoro Franca (Israel), who is a majority shareholder in the Mozambique companies, and I spoke about the order, we have no objection thereto and we would like to comply with the order with effect from its date” (my underlining).

2.4 Despite Mr R[...] alleging in his answering affidavit that he initially thought he had no choice but to comply and his allegation that he was, during June 2018 advised by his second set of attorneys that he could appeal the order, nothing was done in pursuit of this alleged advice until he got wind of the contempt application and the rule nisi calling upon him to respond thereto. This was on 4 September 2019. That was when Mr R[...] resorted to his present set of attorneys (his third in this litigation). The application for leave to appeal was thereafter only filed simultaneously with Mr R[...]'s answering affidavit to the contempt application on 5 March 2020.

2.5 There appears to be substance in Mr R[...]'s complaints about his various attorneys: the first set cost him R1,9 million and juggled counsel right up to three days prior to the actual trial, the second allegedly failed to inform him about the contempt application having been served at their

offices and consented to taxation of the trial costs without telling him. Despite this, and after having been advised of his rights of appeal in June 2018, nothing is done in respect thereof. In fact, insofar as he complains about financial difficulties, he pays in excess of R160 000,00 as his 40% share of Mrs R[...]'s legal costs of the trial, without lodging an application or for leave to appeal against the order compelling him to do so.

2.6 All outward manifestations of Mr R[...]'s conduct for more than two years after the order, therefore amounted to acquiescence as opposed to initiating appellate proceedings. This peremption precludes Mr R[...] from subsequently applying for leave to appeal.

2.7 Even if I am wrong in this regard and even if Mr R[...] is afforded the benefit of doubt as to his ostensible waiver of his right of appeal, there is, in view of the undue delay and passage of time, insufficient explanations why the application had not been launched earlier. One is left with the distinct impression that, had the shoe of the contempt application not pinched, the application for leave to appeal would not have been launched. The condonation application for the late lodging of the application for leave should therefore fail.

2.8 Even if the application for leave to appeal is to be considered on its merits, the attack on the correctness of the judgment is primarily based on the alleged impracticality of the distribution order. I have already referred to the difficulties raised by Mr R[...] in paying Mrs R[...]’s half share of the net rental income in the [...] property to her (with which I shall again deal in respect of the contempt application). The prime alleged impracticality pertains to the transfer of shares. Mr R[...] complains that the shares in the South African company is not held by himself, and lists a number of other objections against having Mrs R[...] as a co-shareholder. None of these aspects were raised at the trial and the shares were all referred to by Mr R[...] in his evidence as his own. The reason why a percentage was ordered, rather than a monetary amount was because Mr R[...] was extremely vague in his evidence in attaching values to his shareholding. The risk was that, if an amount was ordered, Mrs R[...] might end up with less than the determined percentage of the estate/s to which it has been

found that she was entitled to. When I put these issues to Mr R[...]’s counsel, he argued that a great many issues,

including valuations and share price determinations could indicate what a fair order or, at least, a fair division of the value of Mr R[...]’s ownership in the companies should be. The difficulty with this answer is that nothing of this proposed further evidence on appeal had been placed before court. There is not even, in the application for leave to appeal, a reference to the intention to lead further evidence on appeal and neither an indication why such evidence had not been led at the trial. No detail at all has been furnished about the values of the shares or the asset and liability position of the companies and the court is still left with what has been put before it at the trial. An appeal court would be in the same position. This militates against the granting of leave to appeal.

2.9 I find that, even if the appeal had not become preempted and, should condonation for the late launching of the application for leave to appeal be granted, Mr R[...] has not cleared the hurdle of section 17(1) of the Superior Courts Act requiring him to indicate a reasonable prospect of success on appeal.

2.10 Both the applications for condonation and for leave to appeal should therefore be dismissed.

[3] The contempt application

3.1 Mr R[...] has, in his answering affidavit, identified four “themes” in Mrs R[...]’s application, in respect of which she suggested that Mr R[...] has acted in contempt of the order of this court. This thematic approach appears convenient and I shall follow it in this judgment. The four themes are 1) the [...] property,

2) the transfer of shares issue,

3) the Dream Vacation Club points and 4) the maintenance issue.

3.2 The [...] property

3.2.1 This is a lucrative property (estimated at the trial at a forced sale value of US \$ 243 000.00). The current value of Mrs R[...]’s share of the rental income, at the time of hearing these applications, was R 489 136.59.

3.2.2 It is common cause that Mr R[...] has not been paid a cent of this rental income to Mrs R[...].

3.2.3 The reason why the rental has not been paid, so the papers say, is because Mrs R[...] could not furnish Mr R[...] with particulars of an operative bank account in Mozambique. Various other objections to the expatriation of the funds to South Africa and foreign exchange regulations operative in Mozambique were cited. Mr R[...] also stated that, should Mrs R[...] simply receive the funds in South Africa, that would enable her to avoid her tax liabilities in Mozambique. No detail of this was furnished and when Mrs R[...] replied that she was quite prepared to meet all her tax liabilities, this was merely “noted” by Mr R[...]. As Mr R[...] still has assets in South Africa and access to bank accounts here, Mrs R[...] questions why payment was not simply made to her in South Africa and that the necessary adjustments for set-off and taxation be made. Although Mr R[...] was not expressly ordered to make such payment, at all relevant times it was common cause that he administered and received the rent. He has also tendered to pay Mrs R[...], his only gripe is that she made it “impossible” to pay her (in Mozambique). Mr R[...]’s failure to even consider the option of payment in South Africa, indicates a willful intention to frustrate the court order. Mr R[...], as an aside, states that, prior to the order, the rent derived from this property was “utilized” by him towards the parties’ daughter’s tertiary expenses in the UK (he is silent about exchange control or taxation issues relating to both his and Mrs R[...]’s portions of this income and its expatriation). Mr R[...] failed to inform the court what happened to the daughter’s expenses since February 2018 and refused to state where the funds had been held by him for the past three years.

3.3 The transfer of shares

3.3.1 In respect of the transfer of shares in the South African Company, Mr R[...] for the first time, when faced with the contempt application, indicated to the court that the shares were held by the Mozambican company, [...]. He therefore claims impossibility of performance.

3.3.2 This aspect was neither disclosed nor raised as a defence at the trial. The principle debate was the value of the shares of the Mozambican Companies.

3.3.3 In his current answering affidavit, Mr R[...] referred to a “structure” of companies. This indicates that he holds 45% in Engco Limitada, which in turn holds 80% in Engco Investments Limitada, 99,5% in Engco Electrica Limitada and 80% in Fleetco Limitada. He also holds 10% in Peirlite Mozambique Limitada which owns 100% in Engco Engineering Services (Pty) Ltd. None of this was disclosed to the court by him in his evidence. In fact, the reference to 45% shareholding in Mozambique, was portrayed, particularly during cross-examination, as if it referred to either all of the companies jointly, or 45% in respect of each of them.

3.3.4 Be that as it may for the time being in respect of the transfer of shares of the various companies. Mr R[...] initially initiated the transfer of shares process through his erstwhile attorneys. He soon reminded Mrs R[...] about shareholders’ obligations in terms of Mozambican law as well as to the companies. When her attorneys started querying the value of the shares and requested

perusal of the company financial statements, Mr R[...] again hid behind shareholders’ rights to company statements which he was keen to underline, Mrs R[...] was not. Apart from the statutory rights, there was absolutely nothing preventing Mr R[...] from disclosing the financials of the companies to Mrs R[...]. In similar fashion as during the trial more than three years ago, Mr R[...] refused to place Mrs R[...] and, more importantly, the court in possession of the relevant information. Mrs R[...]’s attorneys’ request for this information also prompted Mr R[...] to express fears about possible sale of the shares by Mrs R[...] which may not carry the approval of the other shareholders.

3.3.5 A more pressing motivation not to transfer the shares appears from the following statement by Mr R[...]: “Furthermore, had I acted in the manner demanded by the applicant’s [Mrs R[...]’s] attorneys and/or if the applicant insisted on exercising her rights as a prospective shareholder without compliance of the articles of association ..., I would have been confronted with the real risk of being excluded as a shareholder from the Mozambique companies Furthermore, transferring 40% of my shareholding to the applicant would have the immediate result that I am a minority shareholder who then became subject to the whims and/or dictates of the other shareholders ...”.

3.3.6 Mr R[...] further decided that the companies would be worse off if Mrs R[...] becomes a shareholder whilst she is not in a position to contribute thereto. As proof of her unwillingness, he referred to her refusal to borrow money on the [...] property. He put it as follows in his answering affidavit: “However, after the applicant was not willing to grant her consent that I take

out a loan on the [...] property as aforesaid, which was ultimately intended for the benefit of the Mozambique companies, both Israel and I realized that it will not be in the best interest of the companies and we are no longer prepared to take her in as such” (my underlining).

3.3.7 While one can appreciate Mr R[...]’s concerns for the continued well-being of the Mozambican companies in which he holds shares, either directly or indirectly, it is not open to a party to unilaterally “decide” not to comply with a court order. Such conduct undermines the authority of courts and is, in effect, contemptuous of a court’s pronouncements. This contempt may have been ameliorated, had Mr R[...] applied for amendment or variation of the order or explored alternative ways (such as payment) to comply with the findings that a percentage of his estate must be distributed to Mrs R[...]. By

simply refusing to comply with the redistribution order for reasons of his own, amounts to willful contempt of court.

3.4 The Dream Vacation Club Levies

It is trite that, for a finding of contempt of court to be made, which carries a sanction of possible incarceration, a court must be satisfied beyond reasonable doubt. See: *Fakie No v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) and *Matjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC). In her application Mrs R[...] alleged that a previous amount on the account relating levies has not been paid by Mr R[...] and that a subsequent credit was not as a result of a payment by him, but generated by her. She also alleged that “nothing” had been paid by Mr R[...] in 2020. The statement produced by Mr R[...] does not address all these issues, but seems to suggest that the account is up to date, albeit that some payments were late. There is sufficient of a factual dispute on this issue that no adverse finding can be made against Mr R[...] regarding a finding of contempt of court.

3.5 The maintenance issue

3.5.1 It is clear from the judgment that the question as to whether the transfer of assets would be such in value that it might result in a “clean break” being attained between the parties to the extent that Mrs R[...] might not be in need of maintenance from Mr R[...].

3.5.2 It was therefore contemplated that the maintenance issue would be enrolled by Mr R[...]. This had not happened, despite him saying in his answering affidavit that he had given instruction for this to be done. But, by the same token, neither has the transfer of assets taken place, which would have been determinative of that issue. I need not determine this issue as it has been indicated during argument that Mrs R[...] is no longer relying on this “theme”.

3.6 Based on what I have stated in paragraphs 3.2 and 3.3 above, I find Mr R[...] in contempt of the order of this court of 23 February

2018. I shall deal with the issue of sanction later.

[4] The counter-application

4.1 In his counter-application, Mr R[...] claims the following as alternative to the granting of leave to appeal: that paragraphs 2.2, 2.3 and 2.6 of the initial order substituted with the following:

“2.2 The property known as ... the [...] property ... be sold and the net proceeds thereof shall be paid to the Defendant;

2.3 The Defendant shall retain as his sole property the immovable property known as [...], Maputo, Mozambique and the Plaintiff shall sign all and /or any documents necessary to effect the amendment of the title deed to remove the Plaintiff as a co-owner of this property

2.6 The Defendant shall retain as his sole property all the points in the Dream Vacation Club subscription ...”

4.2 The result of the variation to the order suggested by Mr R[...] would be that he retains both shares of the [...] property as well as both shares of the Dream Vacation Club. He further seeks a deletion of paragraph 2.4 of the order with the result that he does not have to transfer any percentage of his shareholding in nay company to Mrs R[...]. The last patrimonial effect of his suggested variation, is that the home where Mrs R[...] is currently residing be sold and the proceeds be retained by him.

4.3 The variation suggested by Mr R[...] flies in the face of the whole judgment, the redistribution order contained therein and all the various grounds relating to section 7 of the aforementioned Matrimonial Causes Act considered therein.

4.4 The justification put forward by Mr R[...] for the radical reversal of the previous order is Mr R[...]’s contention that Mrs R[...] had already received more than she was entitled to and that a redistribution had already taken place prior to the divorce order. Mr R[...] includes in this “redistribution” the interim maintenance which he had paid in terms of a previous order of this court in terms of Rule 43 (and in respect of which he was substantially in arrears at the time of the divorce) as well as the proceeds of assets which Mrs R[...] had sold in lieu of maintenance payments to defray her expences.

4.5 As part of the justification for the redistribution which Mr R[...] now seeks, he extensively referred to aspects which pre-dated the trial and which cannot now be revisited. Insofar as these facts had been testified about, they had been considered by this court, which is now functus officio and precluded from reconsidering them.

4.6 What can and must be considered, however, is that a court’s orders must be capable of implementation. If a redistribution order, couched in the terms in which it has been done, cannot be implemented and the parties seek a variation thereof, this must be considered in order to render the court’s initial order effective.

4.7 Considering the counter-application then:

4.7.1 The proposed variation regarding the sale of the [...] property is not necessary to render the initial court order effective and cannot be acceded to.

4.7.2 The retention of the [...] property by Mr R[...] as his sole property implies the acquisition by him of Mrs R[...]’s half share. This is also not necessary to render the initial order effective. There is nothing stopping Mr R[...] from purchasing Mrs R[...]’s half share at market value. There is insufficient evidence before court to determine what that half share is valued at. Until that happens, she remains a co-owner and she remains entitled to half of the net rental income.

4.7.3 The retention of the Dream Vacation Club points by Mr R[...] as his sole property is not necessary to render the initial order effective, but it appears that it would avoid future factual disputes regarding the payment of levies. Mr R[...] also contends that to remain in joint ownership of the subscription points forces him into “a relationship” with Mrs R[...] despite the fact that they are divorced. Based on this, he claims transfer of Mrs R[...]’s 50% to him. This transfer and further cutting of the cord between the parties appears eminently sensible and justifiable. It must happen with the necessary quid pro quo, however. Mrs R[...]’s 50% was valued at R44 000.00 at the time of the initial order and no party has suggested that this value has changed since. This portion of the counter-application can therefore be granted against the necessary payment.

4.7.4 Regarding the shareholding: as already indicated, at the time of the divorce, the fear was whether a monetary amount determined then, would actually amount to 40% of the estate to be transferred. If not, Mrs R[...] might be short-changed in the redistribution contemplated. The result however, of ordering a percentage of shareholding to be transferred, has had the unintended iniquitous result that she has for three years seen nothing of a transfer while Mr R[...] had retained full ownership of his shares. The only manner in which the deletion of paragraph 2.4 of the initial order can be justified, is if Mr R[...] makes payment in lieu of the transfer of shares. While it is still correct that Mr R[...] has to date not favoured the court with any proper valuations or financial statements of the companies, what one has, is his initial evidence. During argument, Mrs R[...]’s counsel has indicated acquiescence with the court relying on those figures. The evidence regarding the value of the Mozambican companies was the following: There were assets worth US \$3.3 million and outstanding amounts due to the companies by the Mozambican Government of US \$ 17 million. The company debt amounted to US \$ 9 million. This leaves a net value of US \$ 11.3 million. When confronted with this in cross-examination, Mr R[...] disputed the simplicity of the calculations but offered nothing in the alternative save to state that the Government debt might be uncertain. In the initial

judgment I then gave Mr R[...] a 50/50 benefit regarding the “impairment” or provision for possible bad debt in respect of the R 17 million, and calculated his asset in this regard as 45% of a net asset value of US \$ 2, 5 million, i.e. US \$ 1, 125

million. Mr R[...] was at the time more conservative and estimated the company value at between US \$ 750 000 and US \$1 million. One must assume through, in the absence of any evidence to the contrary, that none of the feared bad debt or

impairment happened, otherwise one would have expected that to feature in the current affidavits. There is also the concession

in Mr R[....]'s papers, that since April 2019, his financial situation has improved. I am therefore disinclined to accept his lower estimates and to revert to the initial “broad” figures of 45% of US \$ 2.5 million. 40% thereof translates to US \$ 450 000.00.

4.7.5 Payment of the above in lieu of transfer of shares might still not achieve the “clean break” referred to in the initial judgment and the issue of liability for maintenance shall, until determined as initially envisaged, remain a live issue. The order in respect of maintenance therefore remains intact.

[5]

Conclusion

In addition to the findings made in paragraphs 2 and 3 above, I therefore find that the counter-application succeeds partially in order to render the initial order effective, but with the necessary quid pro quo's attached thereto so as not to undermine the initial order. This means that:

5.1 Mr R[....] can become the sole owner of the Dream Vacation Club points once he pays Mrs R[....] R44 000 for her half share.

5.2 Mr R[....] can retain the shareholding of the companies mentioned in the order but has to pay Mrs R[....] US \$ 450 000.00. Having regard to the lapse of time, this should happen within the same time-frame contemplated in the initial order, but calculated from date hereof.

5.3 The liability to pay maintenance and to pay to Mrs R[....] her half of the net rental proceeds on the [....] property, remain. In order not to again drift into contempt of court, Mr R[....] is expected to ensure payment of the rental to Mrs R[....] in South Africa.

[6] Costs

In view of the substantial success achieved by Mrs R[....] in the set of litigation as well as the nature of the cause of action in the contempt application, I determine that Mr R[....] should pay Mrs R[....]'s costs of the applications.

[7] Order:

1. The application for condonation for the late lodging of the application for leave to appeal is dismissed.
2. The application for leave to appeal is dismissed.
3. The rule nisi dated 10 July 2019 is confirmed as follows: the respondent is declared to be in contempt of the order of this court dated 23 February 2018 and is hereby sentenced to imprisonment of 60 (sixty days), which sentence is wholly suspended on condition that he makes payment, in South Africa, to Mrs R[....], into her bank account designated by her attorneys on 12 March 2018 of the amount of R 489 136,59, within 30 days of this order.

4. Should Mr R[...] fail in future to ensure that Mrs R[...] is quarterly paid her half share of the net rental income from the property known as [...], Maputo, Mozambique (after adjustment for any taxation payable on such rental by Mrs R[...]), she shall be entitled to approach this court afresh on the same papers as supplemented.
5. The order of this court dated 23 February 2018 is amended by the substitution of paragraphs 2.4 and 2.6 thereof with the following:

“2.4 The Defendant shall pay to the Plaintiff US \$ 450 000,000 within 60 days from date of this order, or within such extension of time as this court may on good cause grant ...

2.6 The parties shall each retain the movable property in their possession at the time of the order as their own save that, upon payment to the Plaintiff of R44 000,00 the Defendant shall become the sole owner of the Dream Vacation Club points”.

6. The date of 60 days referred to in the amended paragraph 2.4 of the initial order shall, for purposes of the payment mentioned therein, be calculated from date of this order.
7. Mr R[...] shall pay Mrs R[...]’s costs of these applications.

N DAVIS

Judge of the High Court

Gauteng Division, Pretoria

Date of Hearing: 1 February 2021

Judgment

delivered: 10 February 2021

APPEARANCES:

For the Applicants: Adv. A M Raymond

Attorney for Applicants: Macintosh Cross & Farquharson, Pretoria

For the Respondent: Adv. H F Geyer

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Prepared on 12 October 2026 · Esheria