

SOUTH AFRICA / JUDGMENT

SR v DR and Another (2980/2007) [2022] ZAGPJHC 172 (22 March 2022)

[2022] ZAGPJHC 172**COURT**

South Gauteng High Court, Johannesburg

BEFORE

L R Adams

CASE / FILE NUMBER

2980/2007

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Policy**THE****REPUBLIC OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG****CASE****NO: 2980/2007****DATE:**

22nd March 2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:

Yes

In

the matter between:

R[....],
S[....] A[....]
Applicant
and
R[....],
D[....]
First Respondent
VAN
DEVENTER & VAN DEVENTER INCORPORATED
Second Respondent
Heard: 15
March 2022 – The ‘virtual hearing’ of this opposed
application was conducted as a videoconference on Microsoft
Teams.
Delivered: 22
March 2022 – This judgment was handed down electronically by
circulation to the parties' representatives by email, by being
uploaded to CaseLines
and by release to SAFLII. The date and time for hand-down is deemed
to be 14:00 on 22 March 2022.

Summary:

Anti-dissipation interdict – arrear maintenance
payable pursuant to divorce order – applicant seeking interim
order
preserving net proceeds of sale of property to recover arrear
maintenance – applicant entitled to interim interdict.
ORDER
(1)
The applicant's application is urgent.
(2)
Upon the registration of the transfer of the first respondent's
property, being Sectional Title section [...] Bushmill, the net
proceeds are to be paid to the second respondent, to be held in
trust, pending the determination and the calculation of the exact
amount of the arrear maintenance payable by the first respondent
to
the applicant pursuant to and in terms of the order of this court
dated 5 December 2008.
(3)
The first respondent shall pay the applicant's costs of this
urgent
application.

JUDGMENT

Adams J:

[1]. In this opposed urgent application, the applicant applies for a preservation order of sorts in respect of the proceeds of the sale of immovable property by the respondent, her ex-husband, with a view to securing payment of arrear maintenance in respect of their children. As far back as 2008 this court, as part of the decree of divorce, ordered the respondent to pay maintenance to the applicant in respect of their children and he is at present in arrears with such maintenance.

[2]. The respondent is in the process of selling his property and the applicant requests that the proceeds of that sale or a portion thereof be appropriated towards the arrear maintenance. The exact order prayed for by the applicant is as follows:

- (1) The second respondent be ordered to facilitate the sale proceeds of the property sold by the first respondent (section [...], Bushmill) through their trust account, and that the first respondent provides his consent thereto.
- (2) The second respondent be ordered to retain all proceeds due to the first respondent in terms of the sale of the property in their trust account, pending determination of the exact amount due on arrear maintenance by the first respondent to the applicant.
- (3) The second respondent be ordered to pay the applicant directly any amount due on maintenance as determined, from the proceeds so retained of the first respondent.

[3]. The second respondent is a firm of attorneys, which has been requested to attend to and is in fact attending to the registration of the transfer of the first respondent's property, being Sectional Title section [...], Bushmill.

[4]. It is the applicant's case that the first respondent is at present in arrears with payment of maintenance in respect of their two children, payable in terms of an order of this Court dating back to 5 December 2008. The applicant estimates such arrear maintenance to amount to about R200 000, but she has as yet not done the

exact calculation. In this application she asks for an interim order preserving the proceeds of the sale of the first respondent's

property pending the determination of the exact amount due to her in respect of such arrear maintenance. The first respondent does not dispute that he is at present in arrears with payment of the maintenance. He also does not seriously take issue with the applicant's claim that the arrears at present amount to approximately R200 000. He does however aver that he fell into arrears through no fault on his part and as a result of circumstances beyond his control, notably the fact that on at least two occasions he was retrenched from formal employment, leaving him in dire financial straits. He nevertheless paid whatever he could towards the maintenance of his children from his meagre resources and even from the proceeds of personal loans obtained from members of his family.

[5]. So, for example, the applicant's attorney, on 25 August 2021, addressed a demand to the first respondent, informing him that as at that stage he was in arrears with his maintenance payments in an amount of R188 067. The first respondent's response to the demand was to the effect that he was experiencing employment and

financial difficulties. He also proposed that he be allowed to make monthly payments of R10 000 per month towards the current

maintenance payable, which, according to the applicant, amounted at that stage to R18 000 per month. There would therefore have been a shortfall of R8000 per month. This shortfall, so the applicant claims, she had to foot.

[6]. At present, so the applicant avers, the first respondent continues to make short payments in respect of his maintenance obligations, which, needless to say, exacerbates the situation. The applicant is of the view that, because of the financial difficulties experienced by the first respondent, he is busy liquidating his assets, whereafter, so the applicant alleges, he will most likely sequestrate himself and claim that the cash was used to pay off other debts, such as those payable to his family. Once this has happened, so the applicant alleges, there will be little or no chance of her recouping any of the arrear maintenance that the first respondent owes her.

[7]. The applicant alleges that this application is urgent as the registration of the transfer is imminent. The applicant fears that, if the net proceeds from the sale of the first respondent's property is paid out to him, he will not utilise any of that money to pay towards the arrear maintenance. The applicant's fear, in my view, is well-founded and her application is urgent. The point is that the first respondent is singularly reluctant to make a commitment to the applicant that he will make a payment from the proceeds to the arrear maintenance.

[8]. The applicant, in my judgment, has established a prima facie right to the net proceeds of the sale of the first respondent's property to receive payment of the arrear maintenance. This property is the only asset in the estate of the first respondent that would effectively settle his indebtedness to her relative to the arrear maintenance payable to her in terms of an order of this court. The applicant has a right to an order sounding in money for the amount of such arrear maintenance. She may also be able to proceed with the issue of a warrant of execution to attach property belonging to the first respondent once she has calculated the amount of the arrear maintenance.

[9]. Until such time as the exact amount of the maintenance is calculated, the applicant is entitled to an order preserving the proceeds of the sale.

[10]. The applicant's case is based on an anti-dissipation interdict, which would require her to show that the first respondent is likely to spirit away the proceeds from the sale of his property. In *Knox D'Arcy Ltd and Others v Jamieson and Others*[1], Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the respondent, ie that the debtor is getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Grosskopf JA

goes on to say that this interdict is sought —

'by the petitioners . . . to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question.'

[11]. Grosskopf JA then turns to the effect of the interdict and finds that it is to 'prevent the respondent from freely dealing with his own property to which the applicant lays no claim'.

[12]. This is the relief which the applicant in casu is entitled to. What she essentially seeks is an interim interdict to secure the proceeds of the sale pending the determination of the exact amount of the arrears payable to her pursuant to an order of this court. It is indeed an interdict as envisaged in the Knox D'Arcy case.

[13]. In my view, the applicant has established that she has a prima facie case that she is entitled to the proceeds of the sale of the first respondent's property. She will suffer irreparable harm since the said property is the first respondent's only asset. The applicant also has no other satisfactory remedy against the first

respondent, who has made it clear that he does not regard as priority his maintenance obligations to the children. In fact, the first respondent views his indebtedness to his family as enjoying preference over his maintenance obligations. There appears to be no logic to the first respondent's reasoning, especially if regard is had to the fact that there is a court order in place, which obliges him to make payment of the maintenance due to the applicant. The same cannot be said of his indebtedness due to his father.

[14]. Without an order interdicting the proceeds of the sale of the property the applicant will be left with little tangible options to protect her rights and interests. The balance of convenience therefore favours the applicant.

[15]. In the circumstances I find that the applicant has set out a prima facie case that the proceeds of the sale should, in the interim, be interdicted until the calculation of the exact amount of the arrear maintenance has been finalised.

[16]. The applicant is however not entitled in this urgent application to an order for payment of arrear maintenance, still to be determined. For starters, an order to that effect is not a competent order as it would not be executable. Moreover, the exact calculations have to be done, whereafter the applicant would be entitled to obtain a court order for payment of the said sum, alternatively, to have issued a writ for payment of the amount due.

Order

[17]. Accordingly, I make the following order: -

L R ADAMS

Judge of the High Court of South Africa

Gauteng Division, Johannesburg

HEARD ON:

15th March 2022 as a videoconference on Microsoft Teams

JUDGMENT

DATE:

22nd March 2022

FOR THE APPLICANT:

Advocate Leon Van der Merwe

INSTRUCTED BY:

Malan Kruger Incorporated, Craighall, Johannesburg

FOR THE FIRST RESPONDENT: In Person

INSTRUCTED BY:

In Person.

FOR THE SECOND RESPONDENT: No appearance

INSTRUCTED BY:

No appearance

[1] Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A); [1996] 3 All SA 669; [1996] ZASCA 58.

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