

SOUTH AFRICA / JUDGMENT

V.B.P v K.M.P and Another (247/2019) [2022] ZAECBHC 39 (30 August 2022)

[2022] ZAECBHC 39

COURT

Eastern Cape High Court, Bhisho

BEFORE

Notyesi

CASE / FILE NUMBER

247/2019

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IN THE HIGH COURT OF

SOUTH AFRICA

(EASTERN CAPE LOCAL

DIVISION, BHISHO)

Reportable

CASE

NO: 247/2019

DATE

HEARD: 04/08/2022

DATE

DELIVERED: 30/08/2022

In

the matter between: V[....]
B[....]
P[....]
APPLICANT
and
K[....]
M[....]
P[....]
1ST RESPONDENT
GOVERNMENT
EMPLOYEES PENSION FUND
2ND RESPONDENT

JUDGMENT

NOTYESI AJ

INTRODUCTION

- [1] The applicant and the first respondent are estranged wife and husband, respectively. They were married to each other in community of property at King Williams Town on 17 February 2009. The marriage produced two offspring currently aged 15 and 13 years, respectively. The children attend school and are under the care of the applicant and the first respondent.
- [2] Having been of the view that the marriage has irretrievably broken down, the applicant launched divorce proceedings before this court on 09 April 2019. The divorce action is defended, but has not progressed satisfactorily.
- [3] Pending the divorce action, the applicant seeks a preservation order in respect of pension interests held by the second respondent under member number [...] due to be paid to the first respondent. Only the first respondent is opposing the application.

BACKGROUND

- [4] It is regrettable that approximately three years have lapsed since the launch of the divorce action, no date of hearing or trial has been set down. (This is unfortunate). Notably, the applicant, in her prayers for the divorce, has asked that both parties retain their respective pension interests as their sole and absolute property. However, in the papers filed in support of the present relief, the applicant indicates that she has instructed her attorneys to amend the particulars of claim so as to include a prayer that the first respondent's pension interest held at the Government Employees Pension Fund, as same is an asset within the joint estate, be taken into account at the time that the joint estate is divided between the

first respondent and her. It is not clear whether such an amendment has been effected or not.

- [5] In her particulars of claim, the applicant has further asked for maintenance in the sum of R5,000 per month per child, payable to her on or before the last day of each and every month until the children become self-support. There is other relief claimed in the divorce action by the applicant, which I do not deem relevant to mention these proceedings. There is no suggestion that the applicant has previously asked for a maintenance order nor rule 43 costs contribution pursuant to the divorce action.
- [6] Both parties aver that the first respondent moved out of the matrimonial home in February 2018. They give conflicting versions of the reasons why the first respondent moved out of the matrimonial home. I do not deem it necessary to incorporate these conflicting versions as they are not relevant to the current application.
- [7] The genesis of the applicant's complaint in these proceedings seems to be an alleged insufficient or total lack of financial support from the first respondent ever since moving out of the matrimonial home.

APPLICANT'S CASE

- [8] The applicant alleges that the first respondent has not paid any cash maintenance to her for the minor children on a month-to-month basis or at all, in any manner whatsoever. The applicant further alleges that the first respondent has failed to contribute in any manner towards the payment of the costs associated with the immovable property situated at [...] Head Drive, Headlands, King Williams Town, in which the minor children and the applicant reside. According to the applicant, the first respondent has also failed to contribute towards the property situate at [...] Pine Lodge, King Williams Town. These properties are jointly owned by the first respondent and the applicant.
- [9] According to the applicant, although the property at [...] Pine Lodge, King Williams Town is being rented out, the tenant failed to pay rentals for several months and that led to the rates, taxes and levies being in arrears. The applicant was thus forced to personally take steps for the eviction of the tenant. The first respondent was not assisting, so the applicant alleges. At one stage, there was a fire at the property which caused substantial damage. That, too, according to the applicant, needed repairs so that the property could once again be rented out. The first respondent did not financially assist in effecting such repairs. The applicant had to assume the responsibility in the absence of allegedly not being assisted by the first respondent.

- [10] The applicant also complains that the first respondent is not timeously paying the monthly salary of the domestic worker who assists the minor children and the applicant at the matrimonial home, although the first respondent continued to pay the domestic worker after moving out of the matrimonial home. For some reason, the first respondent, according to the applicant, fails to pay the domestic worker her salary every month and also refuses to pay anything more than R1,600 per month.
- [11] The applicant also complains that the first respondent, since moving out of the matrimonial home, had stopped payment of rates, taxes and services, to buy electricity and gas and pay for the DSTV at the matrimonial home, including payment of the gardener.
- [12] On being informed that the first respondent would be retiring, the applicant became of the firm view that she needs to take steps to launch proceedings against the first respondent in order to ensure that the future maintenance needs of the minor children are provided for, particularly insofar as their school fees and tertiary costs are concerned. The applicant alleges that, as the first respondent at the time was 61 years of age, the chances of his further employment or earning an income, were becoming slimmer and slimmer. According to the applicant, that would result in the pension interest of the first respondent being his only source of income. The applicant submitted that it is for those reasons that the children's future maintenance needs must be provided for before the pension interest is paid to the first respondent.
- [13] In summary, the applicant submits that, if the first respondent gains access to and dissipates his pension interest, before the future maintenance needs of the children are resolved, the children run the very real risk of not being able to rely on the first respondent in any manner for their current or future financial needs.
- [14] The applicant alleges that the first respondent had refused to confirm that he was indeed retiring and in doing so, the first respondent denied her access to his pension interest in the Government Employees Pension Fund before the divorce is finalised. Through her own investigations, the applicant established that the first respondent was retiring on 31 March 2021. Subsequent thereto, several letters from the applicant's attorneys for confirmation in this regard, had proved to be unsuccessful as no response was provided.
- [15] The applicant seeks the preservation order pendente lite because she is unable to maintain the minor children on her own without maintenance received from the first respondent and she fears that she will not be in a position to do so in future without assistance from the first respondent. In essence, the applicant asks for the court to grant an order that the first respondent's pension interest be retained by the second respondent pending the finalisation of the divorce action and an order dealing with the future maintenance needs of the minor children and the proprietary

consequences of the divorce.

THE FIRST RESPONDENT'S CASE

[16] The first respondent denies that he is not contributing to the matrimonial home and the maintenance of the minor children. He claims to have continued making payment of the minor children's school fees, uniform, stationary and the domestic worker. He also states that he advised the applicant that he could afford R2800 towards the school fees per child. The first respondent has provided a breakdown of the total monthly maintenance that he is currently paying. In a summary these are:

R2 800 school fees per child

R900 uniform

R400 stationary

R1 600 domestic worker

R5 000 contribution towards the children on medical aid

[17] The first respondent alleges that his contribution towards the minor children at present amounts to R13 500 and this aspect was communicated to the applicant's attorneys by his previous legal representatives. The first respondent points out that since moving out of the matrimonial home, he is renting accommodation for himself. That, too, has had an impact on his income. The first respondent submits that he is now a pensioner and has no income for his living expenses. The freezing of his pension interests also impacts his ability to support himself and the children.

[18] The first respondent resists the application on various grounds, but mainly on the following:

18.1 The applicant has failed to establish through acceptable and credible evidence that he has an intention to dissipate and/or conceal the pension interest benefits to which he became entitled in terms of the second respondent's rules by virtue of his retirement on 31 March 2021.

18.2 The applicant, on her own papers, is pursuing the relief for reasons wholly and totally unconnected with the true substrate of what an anti-dissipation and/or preservation order should be directed to protect.

ISSUES

FOR DETERMINATION

[19] This court must determine -

- (a) whether the applicant has made out a case for the grant of an anti-dissipation order; and
- (b) the appropriate order of costs.

DISCUSSION

[20] The remedy provided by the anti-dissipation interdict performs a similar function to that of Mareva injunction of the English law, but the English law principles are not automatically applicable. The interdict has its own unique features. The interdict may be granted where a respondent is believed to be deliberately arranging his affairs in such a way as to ensure that by the time the applicant is in a position to execute a judgment, he would be without assets or sufficient assets on which the applicant expects to execute.[1] It is not a claim to substitute the applicant's claim for the loss suffered, but to enforce it in the event of success in the pending action so that he will not be left with a hollow judgment.[2]

[21] The interdict of this kind is an unusual one. In some cases, it has been described as being draconian in its nature. The applicant lays no claim to the property in question, but it suffices to merely allege a general right to damages or to the matrimonial property. In addition, thereto, the conduct sought to be interdicted, is usually prima facie lawful, yet, its effect is that it prevents the respondent from dealing freely with his assets. The applicant further obtains no

preferential rights over the assets forming the subject matter of the interdict.[3] In order to succeed in obtaining an order preventing the respondent from dealing freely with his assets, the applicant must show that the respondent is wasting or secreting assets with the intention of defeating the claims of the creditors.

[22] The requirements that must be satisfied to obtain an anti-dissipation interdict are the same for any other interim interdict, provided that it has been held that the interdict is sui generis. [4]

[23] As for the standard of proof required and the manner in which disputed facts are to be approached in determining whether the interdict should be granted or not, the Supreme Court of Appeal in *Knox D'Arcy Limited v Jamieson*[5] held :

"The basis of the petitioners' claim as set out in the petition for leave to appeal and their heads of argument is that they have proved prima facie that the First Respondents had an intention to defeat the petitioners' claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely prima facie. However, it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted."

[24] The nature and effect of the anti-dissipation interdict is to establish or show a certain state of mind of the respondent, regarding his assets. The crucial consideration is that the debtor is in some way getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Accordingly, the anti-dissipation interdict is available to petitioners who seek to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets. This is not a usual case where the

purpose is to preserve an asset which is an issue between the parties. Here, the petitioners lay no claim to the assets in question.

[25] The onus rests on the applicant to establish the requirements for the grant of the interdict. The mere fact that the respondent has been irreversibly inconvenienced while the interdict is in operation and the resolution of the main dispute is pending will not in itself be a sufficient reason for the court either to refrain from making an interlocutory order or to treat interim relief as though it were final relief; Irrevocable inconvenience is inherent in the temporary regulations of disputes by means of interim interdicts.[6]

[26] As previously pointed out, the general requirements for the grant of interim interdicts are applicable in respect of anti-dissipation interdicts. In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality*[7] Corbett J (as he then was) said :

“Briefly these requisites are that the Applicant for such temporary relief must show –

(a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or,

if not clear, is prima facie established, though open to some doubt;

(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if

the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that the Applicant has no other remedy.”

[27] In *National Gambling Board v Premier, Kwa-Zulu Natal and Others*[8], the court commented:

“An interim interdict is by definition a ‘court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect the final determination.’ The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim

interdict relates. In an application for an interim interdict, the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court’s jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo.”

[28] In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*[9], Holmes JA following the test laid down in *Setlogelo v Setlogelo*[10] held that the applicant for an interlocutory interdict must show (i) a prima facie right, though open to some doubt, (ii) a well grounded apprehension of irreparable injury; (iii) the absence of ordinary remedy; and (iv) a balance of convenience in favour of the granting of interim relief.

[29] The prima facie right which needs first to be identified by the applicant is one which is, in less stringent terms than one where an applicant claims a final interdict. This means that the applicant bears the onus to place sufficient evidence before the court to show the existence of a right, even though, by reason of denials by the respondent, some doubt is thrown on the existence of that right. If, on the probabilities, there is great doubt, then the applicant will not be entitled to an interdict, even temporarily.[11]

SUBMISSIONS

OF THE PARTIES

- [30] The thrust of Mr Wood's submission, counsel for the applicant, is that the first respondent has failed to put forward information that the applicant and minor children have security pertaining to all future maintenance claims in respect of the minor children. The essence of the submission, which finds support from the allegations made by the applicant in the founding affidavit, is that the purpose of the anti-dissipation interdict is for the protection of the current and future maintenance of the children. The applicant entertains fear that the first respondent is unlikely, at his age of 61 years, and considering the fact that he has already retired, to be gainfully employed in the future. The pension interest would therefore be the only source of income for the first respondent. On this basis, the first respondent may not be in a position to contribute towards the maintenance of the applicant and the minor children.
- [31] Mr Wood further submitted that this court ought to have regard to the alleged historical conduct of irresponsibility by the first respondent. In this regard, Mr Wood pointed out that the first respondent has not paid any cash maintenance to the applicant for the minor children on a monthly basis or at all or in any manner whatsoever since moving out of the matrimonial home in 2018. In addition thereto, the first respondent, according to the applicant, is not contributing to the maintenance of the immovable properties and that puts a financial burden upon the applicant.
- [32] Mr Schultz, counsel for the first respondent, countered this submission by pointing out that the application lacks merit in that the applicant, having accepted that it is incumbent on her to establish by way of credible evidence, that the first respondent has an intention to dissipate and/or conceal the pension interest benefits, has failed to do so. Mr Schultz, in this regard, further submitted that the applicant is pursuing the relief for reasons wholly and totally unconnected with the true substrate of what an anti-dissipation and/or preservation order should be directed to protect. Let me turn to consider these

submissions.

- [32] It is common cause that there is no maintenance order against the first respondent and the applicant has not invoked Rule 43 proceedings which, inter alia, deal with interim relief in matrimonial matters. The applicant has elected to invoke the remedy provided by the anti-dissipation interdict. This court must decide the dispute in accordance with the requirements relevant to the grant of anti-dissipation interdict.
- [33] I approach this matter on the basis that the applicant and the first respondent, as shown from the papers, have two immovable properties, one of which is the primary residence and the other is rented out. The applicant collects rentals. The applicant is in gainful employment. The real dispute between the parties relates to the contribution towards the maintenance of the minor children, the exact amount of maintenance which the first respondent should pay and the timing of such maintenance payments by the first respondent. In this regard, I agree with the submission by Mr Schultz that the maintenance court or some other forum would be best equipped to deal with the above disputes. In the absence of a court order or determination, it is hard to determine how much and by when the first respondent ought to have paid maintenance for the minor children. In my view, rule 43 was specifically designed to deal with such dispute in pending divorce proceedings. The applicant has not deemed it necessary to invoke rule 43 and she elected to base her case on the anti-dissipation interdict remedy.
- [34] The first respondent accepts, in the answering affidavit, that the children have to be maintained and that, in this regard, a reciprocal obligation exists for him and the applicant. The evidence which has been put up by the first respondent shows that he is contributing towards the maintenance of the children and in this regard, I do consider these payments:
- R2 800 school fees per child per month
- R5 000 contribution towards the children on medical aid.
- [35] It may well be that the first respondent is not making punctual payments or at times does not pay, however, that cannot be enough to suggest an intention to dissipate or conceal assets, which is a critical consideration in respect of anti-dissipation order. The purpose of the anti-dissipation interdict is to prevent a respondent who can be shown to have assets and is about to defeat the applicant's claim, or to render it hollow, by securing or dissipating assets before judgment can be obtained or executed, thereby successfully defeating the ends of justice. I am not convinced that this is the case.
- [36] I agree with Mr Wood's submission that it is not essential to establish an intention on the part of the first respondent to frustrate an anticipated judgment for as long as the conduct of the first respondent is likely to have that effect, then the applicant would have succeeded. However, in the present case, the applicant failed to even meet that threshold. Some state of the mind in respect of the first respondent which points to the intention of dissipating the assets is required and the applicant failed to establish this in evidence. Late or non-payment

of maintenance on its own cannot be a decisive factor. More is required for an inference or conclusion to be drawn that the first respondent is conducting himself in a manner

that is likely to frustrate an anticipated judgment. This demands for more information which must link up to the state of the mind for the first respondent.

[37] In *Bassani Mining (Pty) Ltd v Sebosat (Pty) Ltd and Others*,^[12] the SCA reaffirmed the approach in *Knox D'Arcy Ltd and Others v Jamieson & Others* that the remedy provided by anti-dissipation interdict is available where an applicant has shown on the established basis for an interim interdict : (a) a claim against the respondent; (b) that the respondent is concealing or dissipating assets with the intent of frustrating the claim. Whilst I accept that the pension interest of the first respondent is an asset in the joint estate and that the applicant has some rights, however, the applicant dismally fails to establish the second leg that the first respondent is concealing the pension interests or is dissipating same.

[38] In the particulars of claim in respect of the divorce proceedings, the applicant made it patently clear that the first respondent retains his pension interest as his sole and absolute property. I do accept that the applicant intends to amend such a prayer in due course. However, that cannot detract from my conclusion that she always knew about the pension and the age of retirement of the first respondent, since they are a married couple.

[39] Most significantly, it has been disclosed that the first respondent's pension fund benefit, as on 31 March 2021, was a sum of R5 955 836. In terms of the second respondent's rules, the first respondent is only entitled to withdraw one-third of the pension interest and the balance is payable as an annuity for the rest of his life. It is

obvious that the first respondent would not be in a position to dissipate the pension interest in the manner contemplated for the

grant of an anti-dissipating interdict.

[40] The first respondent is unemployed and for his livelihood, he would depend on the payment of this one-third share of the pension interest and that would assist as well towards the payment of maintenance of the children. The court should not likely decide to freeze the pension payment, in circumstances where the first respondent would be unable to sustain his own living.

[41] The facts of this particular case do not establish the need for the proposed intervention. I have taken into account the provisions of section 28 of the Bill of Rights which pertains to the right of children to proper parental care. In this case, the first respondent is contributing to the maintenance of the children, albeit in an unsatisfactory manner, according to the applicant. The applicant has a remedy in this regard.

[42] I have also considered the judgments to which Mr Wood has referred this court dealing with the children's rights and the obligations of parents. All those cases have no application to the circumstances of the present case. The case of *Bannatyne v Bannatyne & Another*^[13] and

Magewu v Zozo & Another[14] find no relevance. I have also considered the judgment of SR v DR and Another[15]. In this case, the court considered the fact that the applicant was in arrears of payment of maintenance and that he had sold his property. Those facts were enough to satisfy the court to grant an anti-dissipating interdict. In the circumstances of this case, there is simply no evidence that the first respondent is concealing assets or property. All the complaints relate to the insufficient support or financial contributions to the matrimonial home and the maintenance of the minor children. I have no doubt in my mind that this family has sufficient assets in the form of immovable property and all these properties are in the control of the applicant at present, including the rented home. The maintenance court or rule 43 proceedings may effectively regulate the payment of maintenance and first respondent's contributions.

[43] The applicant has failed to make out a case and is, in my view, not entitled to any relief.

COSTS

- [44] In the consideration of the costs, I do take into account the history of litigation which reflects an unsatisfactory state of affairs. The applicant approached the court on an urgent basis. The certificate of urgency was submitted for directions by the court on 12 March 2021. The directions were issued on the basis of such urgency.
- [45] The matter was enrolled for hearing on 30 March 2021 and timelines were truncated for the filing of papers. On 30 March 2021, the parties took an order by consent which effectively allowed for an interim order and the application was postponed to 13 April 2021. On 13 April 2021, the matter was postponed sine die.
- [46] Since 13 April 2021, the applicant, who had approached the court on an urgent basis, took no steps to have the matter finalised. In May 2022, the first respondent took the initiative to apply for a date of hearing of the application and the matter was enrolled for hearing on 4 August 2022. It is well to remember that the divorce proceedings, although instituted approximately 3 years ago, are yet to be heard. No trial date has been set for the hearing of the divorce.
- [47] It is becoming a common trend that once parties, as is the case here, obtain an interim relief on an "urgent" basis, they adopt a supine position with regard to the finalisation of such urgent applications. This is undesirable. I do share Mr Schultz's concerns that the first respondent, a pensioner, was unable to use his personal pension fund benefits for the duration of the order and that was likely to endure for an indefinite period as it seems that the divorce proceedings are nowhere near to finalisation. The submissions of Mr Wood that this court should consider unfreezing a portion of the pension benefit is not an answer to the concerns of Mr Schultz. The applicant has chosen a cause of action and she must make a case in relation to that cause of action, which she has failed to do. I also reject the submissions on punitive costs. None of the parties has made out a case for a punitive costs order. Whilst there was mention of a court order investigation, neither evidence nor serious submissions were made in this regard.

[48] Both parties had asked for costs in the event of success. The trite legal position is that costs follow the results. I have not been persuaded differently.

CONCLUSION

[49] In the circumstances of this case and for all the reasons set out above, the applicant has failed to make out a case and it follows that the application should be dismissed with costs and the rule nisi issued on 30 March 2021 discharged.

ORDER

[50] In the result, I grant the following order:

1. The rule nisi issued on 30 March 2021 is discharged.
2. The application is dismissed with costs.

M NOTYESI

ACTING JUDGE OF THE HIGH COURT

Appearances

Counsel for the applicant : C Wood

Instructed by

: Difford Underwood Inc.

c/o Squire Smith & Laurie inc

KING WILLIAMS TOWN

Counsel for the 1st respondent : NCF Schultz

Instructed by

: Smith Tabata Inc

[1]Carmel Trading Company Ltd. v Commissioner for the South African Revenue Services and Others (447/07) [2007] ZASCA 160; [2007] SCA 160 (RSA); [2008] 2 All SA 125 (SCA); 2008 (2) SA 433 (SCA) (29 November 2007)

[2] Msundunzi Municipality v Natal Joint Municipality p/p Fund 2007

(1) SA 142 (N) at 157

[3] The Civil Practice of the High Court of South Africa, Herbstein and Van Winsen, vol 2, 5th ed at 1488-1493 and the authorities cited in Chapter VII titled ; “Anti-dissipation Interdicts (the So-called “Mareva-Type

Injunctions” or “Freezing Injunctions”. See also the unreported judgment of Hartley J in JLT v CHT & Another (EL 819/2020) [2021] ZAECELLC 4 (22 January 2021) – the judgment is available in SAFLII

[4] Knox D-Arcy Limited v Jamieson 1995

(2) SA 579 (W) AT 600 – B - C

[5]

[1996] ZASCA 58; 1996

(4) SA 348 (A) at 373 E - H

[6] Knox supra at 603 - 604

[7] 1969

(2) SA 256 (C) at 267A-F

[8]

[2001] ZACC 8; 2002

(2) SA 715 CC at 730-731

[9] 1973

(3) SA 685 (A) at 691 C-E

[10] 1914 AD 221

[11] Msunduzi Municipality v Natal Joint Municipal P/P Fund supra at 152E-G

[12] (835/2020)

[2021] ZASCA 126 (29 September 2021)

[13] [2004] 3 All SA 235 (C) at para 18 p 7

[14] [2004] 3 All SA 235 (C) at para 21, p 9

[15] (2980/2007)

[2022] ZAGPJHC 172 (22 March 2022) by Adams J

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