REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 43425/11

DATE:15/10/2012

In the matter between:-

DS, R Applicant

and

DS, M & OTHERS Respondents

JUDGMENT

A J BESTER, AJ:

[1] In this application the Applicant and the First Respondent, both of whom are consulting actuaries, are married out of community in terms of an anti-nuptial contract.

[2] The contract stipulates that their marriage would be governed by the provisions of chapter 1 of the Matrimonial Property Act, 1984 ("the Act").

[3] The parties are embroiled in a protracted and an apparently acrimonious dispute about the

patrimonial consequences generally, and in particular about the determination of their respective accruals.

[4] The parties have already agreed that the effective date for the calculation of their net assets for the purposes of the accrual calculation would be 28 February 2011.

[5] The Applicant claims that she is entitled to a significant portion of the accrual in the First Respondent's estate not only by virtue of the provisions the Act, but also because she is entitled to a forfeiture. She furthermore contends that the greater portion of the accrual in the First Respondent's estate comprises monies earned by her and not by the First Respondent. The Applicant contends further that the First Respondent is squandering those assets. The Applicant therefore seeks, in essence, so called "anti-dissipation' relief against the First Respondent pending the finalisation of their divorce.

[6] The First Respondent, who has made several attempts to resolve the dispute with the Applicant, disputes those contentions. He says, particularly, that his use of the monies in his estate is not out of the ordinary or unusual, but is limited to that required by the day-to-day conduct of his actuarial consultancy business and to cover his living expenses and that of their minor daughter who lives with him. He shows, for example, that funds withdrawn for business operational purposes are and have been regularly replenished as and when income is generated by his business.

[7] On 22 March 2012, the Applicant, on an urgent basis, sought, in terms of Part A of her Notice of Motion, an order comprising wide-ranging provisional relief to restrain the First Respondent, among others, from withdrawing or receiving funds invested in his name with

the Second, Third and Fourth Respondents pending the resolution of her application for interim relief sought under Part B of that Notice. On that day the parties, however, reached agreement on provisional relief pending the filing of answering and replying affidavits and the hearing of the application for interim relief sought by her under Part B of the Notice.

[8] The application for the Part B relief was set down for hearing today. The Applicant, therefore, now seeks the interim relief under Part B of her Notice of Motion pending the final determination of the divorce action between them. Irrespective of the fact that she seeks interim relief only, she nevertheless asks for an award of costs against the First Respondentjof the application on a punitive scale. She does not seek costs from the Second, Third and Fourth Respondents as they do not oppose the application.

[9] The First Respondent opposes the relief now sought by the Applicant and seeks an order dismissing the application with costs.

[10] Such a dismissal would, of course, have the effect that the Part A provisional relief obtained by consent, would also fall away.

[11] Prima facie, because the parties are not married in community of property, the Applicant has no vested rights in any of the assets invested or registered (as the case may be) in the name of the First Respondent, be it money, shares, immovable or immovable property or indeed in any other item in, or portion of, the his estate.

[12] Sections 3(1) and 3(2) of the Matrimonial Property Act make it abundantly clear that only on the dissolution of the marriage, among others, by divorce, does a spouse acquire a right to

claim half of the net accrual of the other spouse's estate.

[13] Before that dissolution a spouse who has an accrual in his or her estate that is smaller than the accrual in the estate of the other spouse has a only contingent right to claim half of the accrual in the estate of that other spouse; not a vested right. The Applicant's alleged contingent right will therefore become a vested right only when the contingency materialises. That contingency may include,

a) a dissolution of the marriage by divorce or death;

b) if there is, at the effective date agreed by the parties, an accrual in the estate of the First Respondent greater than the accrual in the Applicant's estate;

c) a forfeiture in whole or in part of the right to participate in an accrual.

See: Reeder v Softline Ltd and Another 2001 (2) SA 844 (W) at 849C-J

[14] Whatever claim the Applicant therefore might have at this juncture in respect of the separate property of the Respondent or a part thereof; it is not a vested right, but a right contingent upon the divorce that she seeks. But at this juncture, her claim of a right is disputed.

[15] The Applicant therefore has no general right to prevent the Respondent from freely dealing with his own separately held property in respect of which she has no vested right, and neither does she have a general right to seek to compel the Respondent to regulate his bone fide expenditure and use of his property so as to ensure that funds are available for the settlement of her alleged contingent right.

[16] In this regard, therefore, when it is submitted on behalf of the First Respondent that the

Applicant has failed to establish a prima facie right to the funds held in the various accounts targeted by the relief she seeks, I agree. I also agree with the submission that the First Respondent will only have a claim for payment of monies if it is established at the dissolution of the marriage that there was, at the effective date agreed by the parties, an accrual in the First Respondent's estate that is greater than the accrual in the Applicant's estate.

[17] However, it is trite that that even a contingent right to claim half of the accrual in the estate of the other spouse could be protectable by interdict pendente lite, but then an applicant for such relief must show:-

a) that the respondent has assets within the jurisdiction of the court;

b) that the respondent, prima facie, has no bona fide defence against the applicant's alleged contingent rights;

c) that the respondent has the intention to defeat the applicant's claim or to render it hollow by dissipating or secreting assets away so as to defeat it.

[18] But even if these jurisdictional requirements are present, then an applicant must still show a well-grounded apprehension of irreparable loss should the interdict pendent lite not be granted. It is perhaps apposite here to point out that, because of the Draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it except in the clearest of cases.

See generally in the above regard: Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A), 372C; Mngadi v Beacon Sweets & Chocolates Provident Fund and Others 2004 (5) SA 388 (D) 396E; Reeder v Softline Ltd, supra, at 849-851.

[19] The Applicant generated a mass of paper in this application in an attempt to show that

much of the First Respondent's accrual, and approximately two thirds of it, although invested in, and registered under his name, was in fact generated by her income, not by his. That, she attempted to demonstrate, amongst others, by a comparison of the income supposedly generated by the First Respondent with detailed calculations of her own income, the latter supported by selected documentation. She calculates that her total assets amount to approximately R7,500,000.00 and the First Respondent's to approximately R22,000,000.00. But her calculation of the First Respondent's income is not supported by any real evidence but is based, on her own admission, on "certain assumptions".

[20] The First Respondent reciprocated in his answering affidavit by putting up detailed evidence relating to the income generated by him during their marriage to show that her assumptions are incorrect and that the assets in his estate were generated by his own endeavours. He also says that his total current net asset value amounts to approximately R20,000,000.00.

[21] The Respondent contends that, if successful, she would be entitled to claim R11,110,246.00 from the First Respondent's estate, because that sum represents, in essence, her monies, not his. If that is correct, and if that sum is deducted from the First Respondent's estate and added to hers, then her accrual would of course exceed by far the accrual in the First Respondent's estate. Simply accepting, for arguments' sake that the First Respondent's calculations of the parties' respective accruals are correct, namely that, as it the effective date, her total assets re approximately R7,500,000.00 and his approximately R22,000,000.00, the effect of such an adjustment is obvious: the First Respondent would, at dissolution of the marriage have a significant claim against the Applicant. But that, the Applicant says, does not matter, for she is also entitled to a forfeiture, an allegation which the

First Respondent denies. However, even that forfeiture is disputed and certainly not even shown, prima facie, on the papers before me.

[22] Both parties therefore base their allegations on assumptions and inferences drawn from incomplete information and then proceed, on these, to make calculations to support their claims and denials. Undeniably, these attempts raise disputes of fact that are incapable of resolution on affidavit and would only be capable of determination after full discovery and oral evidence at the anticipated divorce hearing. That much, counsel for both parties conceded during argument.

[23] It is, therefore, in my view not possible, on the basis of such tenuous affidavit evidence, to make a finding that the First Respondent prima facie does not have a bona fide defence against the Applicant's apparently valid contingent rights and claims based on them.

[24] Furthermore, it is not apparent from the papers in the application that, prima facie, the First Respondent indeed intends to defeat the Applicant's claim or to render it hollow by dissipating his assets in order to defeat her claim. The Applicant contends that such an inference could be drawn on, for example, the First Respondent's withdrawal of funds from certain of his accounts. However, by virtue of the nature of the investments so drawn on; the current balances on those accounts; and the nature and volume of transactions effected on them, these withdrawals are by no means so extraordinary that they warrant an inference of mala fides or some other conduct with nefarious intention.

[25] On the contrary, the First Respondent's evidence is that these transactions are normal, day-to-day dealings for the purposes of conducting his normal business activities and for

meeting personal requirements. As further demonstrated by him, a substantial part of his investments can in any case not be drawn on until he reaches age 55; some 13 years hence. Furthermore, the First Respondent has given, and repeated in his answering affidavit, a tender made as far back as 29 May 2012, to retain untouched assets of a very substantial value of about R9,000,000.00 which he says would more than amply cover any claim that the Applicant might eventually prove against him.

[26] That evidence and tender show anything but mala fides and ought to have reassured the Applicant of the First Respondent's good intentions. The application was in my view, therefore, a wasteful exercise.

[27] But there is more. As is the case with the Applicant, the Respondent is a highly qualified and skilled professional with an enormous income earning potential. That is demonstrated vividly by the fact that, between the two of them they were able to amass, within a very short working life, a fortune in assets worth well over R25,000,000.00, despite having maintained a very lavish lifestyle. Therefore, even if the Applicant is ultimately successful with her claims, and even if the First Respondent is incapable immediately to settle the whole or part of whatever the Applicant might eventually be found to be entitled to, she will get her relief - there is no reason whatsoever to fear that, after the divorce, the First Respondent would not be capable of settling, within a relatively short period of time, any balance owed to the Applicant out of his ordinary income.

[28] The Applicant has therefore not shown a well-grounded apprehension of irreparable loss. On the contrary, the First Respondent has shown that, should the Applicant be successful with her claim, he would be able to meet an award of whatever might be found to due to her,

if not immediately, then certainly soon after such award.

[29] There is, however, a further ground that militates against the Applicant. The relief that she seeks in this application is temporary, pending the resolution of the divorce action. The Applicant claims that, if the relief is not granted, she would be "irreparably prejudiced" as the investments in the First Respondent's name in respect of which she claims she has a right could, at worst be depleted and at best, that she would not share in the fruits of the investments earned before the divorce. Those fears are exaggerated. The effective accrual date has been set and the debatement and determination of their respective accruals at the divorce will, if she shows an entitlement to anything, compensate her. As opposed to these concerns, the First Respondent demonstrated that, if the relief is granted, it would deprive him of the working capital that he requires for the conduct of his business and that the restraints that the Part B relief would inevitably impose on his ability to do so, would have significant prejudicial consequences for his business and his cash-flow. In response to this evidence, the Applicant's terse reply is a bald denial and a contention that, if the relief places a constraint on the First Respondent's entitlement to deal with his own assets in order effectively to run his business, then the he can simply go and get finance elsewhere or make use of his "other, undisclosed income". These bald and rather callous allegations do not serve to disturb the balance, which in my view the First Respondent has shown to be decisively in his favour.

[30] The Applicant has accordingly not shown that she has met the jurisdictional requisites for the interim, anti-dissipation interdict relief sought.

[31] Finally, it needs to be pointed out that, apparently belatedly realising that her case for

anti-dissipation relief had not been made out in the founding affidavit, the Applicant, in argument on her behalf before this court, changed gear and contented that her right to the interim relief sought, was in fact not found in a contingent right to share in an accrual, but that is was founded in a "universal partnership" between the Applicant and the First Respondent.

[32] That stratagem was apparently intended to facilitate argument that, because there was a pooling of assets or commonly held assets, the Applicant has, as this juncture, a vested right in her share of those commonly held assets. The submission was also made in argument that it is common cause that there was express agreement regarding that universal partnership but alternatively, that a tacit universal partnership existed. The existence, and even the alleged tacit existence, of such an alleged universal partnership is, however, anything but common cause. It is not even mentioned by name in the application papers before me.

[33] During argument, I therefore put it to Ms Rosenberg, SC that I have great difficulty with the notion that one could found an application for interim relief, pending the final resolution of an action, on a cause of action that is not even relied upon in the action itself. She argued, however, that there was a claim by the Applicant for repayment of her income invested in instruments of the First Respondent in the Applicant's particulars of claim; therefore there was, in effect, an indirect reliance on such a cause of action in the Applicant's divorce summons. However, perusal of the particulars of claim in the summons (attached to the Applicants founding affidavit as Annexure "RDS24") does not in my view allege anything that could be said to be a universal partnership; at best for the Applicant she there alleges certain oral agreements as to the deployment of certain of her assets, but otherwise the allegations comprise general averments relating to the determination of their respective accruals; the date upon which the accrual is to be determined; and the settlement of what would be due to

her. If there was a reliance on a universal partnership in the action, one would at the very least have expected to find an allegation of such

a partnership (expressly concluded or tacit) and, for example, prayers for a dissolution of that partnership; a statement and debatement of account in respect of the pooled or commonly held assets; a division of those assets; and payment to the partners in accordance with their respective shares.

[34] I am accordingly of the view that the Applicant's universal partnership argument was a mere convenient afterthought argued in an attempt to circumvent the perceived deficiencies in the anti-dissipation relief sought in the application.

I accordingly make the following order

(a)The application is dismissed with costs.

A J BESTER

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

COUNSEL FOR THE PLAINTIFF : ADV R ROSENBERG SC

INSTRUCTED BY :

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INSTRUCTED BY :

DATES OF HEARING : 15 OCTOBER 2012

EX TEMPORE JUDGMENT : 15 OCTOBER 2012