THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG
CASE NUMBER: 40691/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES

12 December 2016 **MODIBA J**

L., A. **Applicant**

and

L., W. **Respondent**

JUDGMENT

[1] This is a reconsideration application in terms of rule 12(6) (c) of the Uniform Rules of Court.

[2] The application arises from the background set out below, the facts of which are common between the parties:

[3] The applicant is A. L. (Mrs. L.). The respondent is W. L. (Mr. L.). In 1999, a marriage out of community of property was concluded between the parties. Prior to the marriage, the parties concluded an *ante* nuptial contract (ANC), subjecting their respective estates to the accrual system. The ANC determines their respective estates at the commencement of the accrual and excludes from the accrual, certain identified assets.

[4] Mr. L. has expressed his intention to terminate the marriage by divorce. However, he is yet to issue the summons commencing the divorce action.

[5] On 15 November 2016, Mrs. L. launched an application in terms of which she sought an order in the following terms:

> ***"PART A***
>
> 1. *Condoning the Applicant's non-compliance with the rules of court and entertaining this application as one of urgency in terms of rule 6 (12) of the Uniform Rules of Court;*
> 2. *Interdicting the Respondent from transferring assets held by him or his nominees and the Acacia Trust, Isle of Man, the Whitehall Trust, Isle of Man, the Providence Trust, Isle of Man and Whitehall Acacia Trust, Isle of Man, into any living annuity including but not limited to any living annuity administered by Acacia International Retirement Scheme ("Airs") pending the final determination of the relief claimed in Part B;*
> 3. *Interdicting the Respondent from transferring any assets owned by him or his nominees or held in the name of the trusts set out in paragraph 2 above or disposing of the assets save on not less than 30 days ' written notice delivered by email to the Respondent's attorney of record and to the Applicant pending the final determination of Part B of this application;*
> 4. *That the costs of this application be reserved for determination of the court hearing in Part B;*
> 5. *Further and/or alternative relief.*
>
> ***"PART B***
>
> 1. *That there be an immediate division of the accrual in accordance with the provisions of Section 8 (1) of the Matrimonial Property Act, 88 of 1984, read together with the* ante *nuptial*

contract concluded between the parties, alternatively on such other basis as the Court may deem just;

2. *That from the date of granting of the order for an immediate division of the accrual the proprietary system applicable to the marriage between the parties shall be one out of community of property and community of profit and loss and that the accrual system shall be expressly excluded;*
3. *That the costs of the application including the costs of the application under Part A* (sic);
4. *Further and/or alternate relief."*

[6] On 17 November 2016, Mrs. L. obtained an order in terms of Part A of the notice of motion. Makume J granted the order in urgent court on an *ex parte* basis. The *ex parte* order, together with the application, was served on Mr. L.'s attorneys on the day the order was granted.

[7] On Thursday 24 November 2016, approximately a week after he was served with the documents referred to in paragraph 6 above, Mr. L. filed a notice in terms of Rule 12(6) (c). He served the notice on Mrs. L.'s attorney by email at approximately 12h00. The notice indicates that the application would be heard at 10h00 on Tuesday 29 November 2016.

[8] On 28 November 2016, Mr. L. filed an answering affidavit. Prior to it being filed, it was served on Mrs. L.'s attorney at 12h00 on 28 November 2016. The answering affidavit is brief. It only sets out the grounds on which Mr. L. seeks to have the *ex parte* order reconsidered. Before I deal with the substance of the reconsideration application, I first consider a procedural issue that arises in the application.

PROCEDURE FOR BRINGING AN APPLICATION IN TERMS OF RULE 6(12) (c)

[9] The application raises a question whether the requirements for bringing urgent applications both as set out in the uniform rules of court and in the practice directives of this court apply to an application in terms of rule 6(12) (c). What highlighted this issue is the inconvenience experienced not only by the court but also by Mrs. L. occasioned by the manner in which the application was brought.

[10] For ease of reference, I quote the relevant rules and practice directive below:

> "8.1 When an urgent application is brought for the Tuesday at 10h00 the applicant must ensure that the relevant papers are filed with the Registrar by the preceding Thursday at 12h00.

> 8.2 The Registrar's office must ensure that the court files of all urgent applications set down for the Tuesday at 10h00 are brought to the clerk of the judge hearing the urgent applications by 10h00 on the preceding Friday.

[11] When I received the files for the urgent court cycle commencing Tuesday 29 November 2016, Mr. L.'s answering affidavit had not been filed. Only the notice in terms of rule 12(6) (c) had been filed. As a result, when I read the papers, I was not privy to the grounds on which Mr. L. sought the *ex parte* application reconsidered. Until Mr. L.'s answering affidavit had been served on Mrs. L.'s attorney, he (Mrs. L.'s attorney), was in a similar position as the court. He was unapprised of the case his client was required to meet in the reconsideration application. I became aware that the answering affidavit had been filed when Mrs. L.'s replying affidavit was filed as part of an indexed and paginated bundle of the application short of an hour before the court sat on Tuesday 29 November 2016. As indicated, I had already read the papers as filed when the application was received from the Registrar's office. A busy urgent court roll with several extremely urgent matters in which voluminous papers had been filed, as well as the limited time leading to the sitting of the court did not afford me the opportunity to revisit the papers. As a result, when my attention was drawn to the matter in court, I was not ready to deal with it.

[12] I expressed the view that the matter ought to be struck off from the roll for non-compliance with paragraph 8.1 of the practice directive. Not all the documents on which Mr. L. sought to rely had been filed by Thursday 12h00.[1] As already stated, his answering affidavit was only filed towards the end of the day a day prior to the hearing of the matter. It was only brought to my attention on the day the matter was due to be heard, not affording me the opportunity to adequately prepare to hear the matter. This is one of the reasons that prompted Wepener J to deliver a written judgment in *In re Several Matters* to provide clarity on the responsibility of the party setting down an urgent application. Mr. L.'s counsel contended that the application is rendered urgent by the fact that the order was granted *ex parte* and for that reason, Mr. L. is entitled to have it reconsidered on 24 hour notice to Mrs. L.. For that reason, the rules and practice directives that apply to urgent applications do not apply to a reconsideration application. His counsel further contended that since Mr. L. filed the notice in terms of Rule 12(6) (c) on Thursday, for hearing on Tuesday, he had given Mrs. L. more than adequate notice to prepare for the application. I do not agree.

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[1] See also judgment by Wepener J in In Re: Several Matters on the Urgent Roll [2012] ZAGPJHC 165: [2012] 4 All SA 570 (GSJ); 2013 (1) SA 549 (GSJ) (18 September 2013).

[13] Although the notice in terms of Rule 12(6) (c) was served on Mrs. L. on Thursday, given that it was not accompanied by an answering affidavit, there is nothing her attorney and counsel could have done to prepare to argue the application as they were not privy to the grounds on which he sought the application reconsidered. They were only apprised of Mr. L.'s case on 28 November 2016 after the answering affidavit had been filed. They prepared a replying affidavit which was only filed on Tuesday 29 November 2016. As mentioned above, my attention was only drawn to this document when the matter came up in court. I then stood the matter down to Wednesday 30 November 2016 to allow me to study the papers and to hear argument on urgency.

[14] Rule 12(6) (c) does not stipulate the period within which a reconsideration application may be brought. Mr. L.'s counsel's argument on urgency centered on rule 6(8) which allows a respondent in an *ex parte* application brought and an order granted in the ordinary course, to anticipate its reconsideration on 24 hours' notice to his opponent. Counsel for Mr. L. contended that the application should be struck from the roll with costs for lack of compliance with the requirements set out in the practice directive in respect of urgency. I do not agree with this contention.

[15] On the authority in *Lorenco and Others v Ferela (Pty) Ltd and Others (No1),*[2] rule 6(8) also applies to *ex parte* applications obtained on an urgent basis. However, I am of the view that rule 6(8) does not give an applicant carte *blanche* to assert his entitlement to bring a reconsideration application on 24 hours' notice to do so in a manner that is inconvenient to the court and prejudicial to his opponent. The circumstances of each case and considerations of convenience and fairness are pivotal when the court exercises its discretion to enroll a rule 12(6) (c) application.

[16] The rationale behind rule 6(8) is to limit the exposure of a party against whom an order was granted in his absence to the effects of such an order by giving him the right to have the order reconsidered at 24 hour's notice. Mr. L. did not take full advantage of this rule. He could have brought the application on Friday 18 November 2016. He offered no reason why he did not do so. He waited a full week before he took action in terms of this rule. A close look at the course he followed reveals that he followed the customary Thursday to Tuesday rule envisaged in 8.1 of the practice directive because he filed the application on Thursday for hearing on Tuesday. Having taken a week to file the application, there is no reason why he did not file his

[2] 1998 (3) SA 281 at 290A-C.

answering affidavit simultaneously with the notice in terms of rule 6(12) (c). He had a full week to prepare it. The time when he filed it created an inconvenience to the court. It was also prejudicial to Mrs. L.. I say so mindful of the fact that rule 12(6) (c) is silent on the filing of an answering affidavit.

[17] The rule is couched in wide terms. There are divergent judgments on whether the court is limited to only reconsider the application on the papers served before it when the *ex parte* order was granted or whether the party bringing a rule 6(12) (c) application is entitled to file opposing papers. Joffe J in *Rhino Hotel & Resort (Pty) Ltd v Forbes and Others*[3] prefer the former position while in L*orenco, ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others*[4] and *Oosthuizen v MIJS*[5] the court favours the latter position. In my view, the broad scope of Rule 6(12) (c) should not be tempered with. Leaving the scope broad allows a party bringing the application to adopt a strategy that best advances his case in the most effective manner. The approach preferred in *Rhino Hotel & Resort* will be effective where the applicant only wishes to attack the *ex parte* application on the papers as they served before the court that granted the order. The latter scenario would benefit a party who wishes to place evidence before the court to show why the *ex parte* order should be set aside. In such a case, an answering affidavit ought to be filed simultaneously with a rule 6(12) (c) notice to avoid inconvenience and prejudice that arose in this case. On the authority *in ISDN Solutions (Pty) Ltd*, the applicant will be entitled to file a reply.

[18] Given that the parties were ready to argue the matter when it served before me on Wednesday 30 November 2016, I enrolled it because although Mr. L. delayed to bring the application, the delay was not so inordinate that it defeated the purpose of rule 6(8). This was the scenario in *ISDN Solutions (Pty) Ltd*[6] where the court found that due to the delay in bringing the application, as well as the fact that the hearing of the main application was eminent, entertaining a rule 6(12)(c) application under those circumstances would not serve the intended purpose.

[19] Mr. L. only delayed by one (1) week. Despite my misgivings with the manner in which he brought the application, the inconvenience he caused the court and the prejudice he caused the

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[3] 2000 (1) SA 1180.
[4] 1996 (4) SA 484.
[5] 2009 (6) SA 266.
[6] Cite the relevant paragraph.

applicant is not of such a nature as to obliterate his rights in terms of rule 6(8), particularly because the inconvenience and prejudice may be remedied with a cost order.

[20] I now turn to deal with Mr. L.'s grounds for the reconsideration application. It is apposite to mention at this juncture that the answering affidavit was deposed to by Mr. L.'s attorney. Mr. L. opted not to personally depose to an affidavit. On his attorney's advice he also opted not to serially respond to the allegations contained in the founding affidavit because doing so will, to use his attorney's formulation *"give credence to the applicant's obvious attempt to force the respondent to answer the interrogatories that her attorney posed in a letter of 26 October 2016".* In the main, the answering affidavit decries the competency of an application in terms of section 8 of the Matrimonial Property Act[7] (MPA) in the circumstances of this case. It then deals with the purported material non-disclosure of an agreement between the parties, concluded through the exchange of letters dated 14 and 15 November 2016. His attorney contends in the answering affidavit that the *ex parte* order ought to be set aside on that ground alone. I deal with this contention in more detail below. In her heads of argument, Mr. L.'s counsel went further and relied on facts not set out in the answering affidavit. Such facts do not merit consideration as they are not properly before court. Only contentions based in law merit consideration, even though they were only raised in Mr. L.'s counsel's heads of argument for the first time.

[21] On the authority in the seminal *Plascon Evans* judgment, I adjudicate this application on the facts disputed by the respondent, on common cause facts or on facts not disputed or unreasonably disputed by the respondent. Therefore, given that the facts in the founding affidavit largely stand undisputed, unless they are so far-fetched that it is unreasonable to rely on them, the application stands to be determined by them.

[22] The high water mark of Mr. L.'s objection to the *ex parte* application is that it is an attempt by Mrs. L. to use application proceedings to achieve an objective that is ordinarily pursued in terms of section 3 of the MPA. She would be entitled to obtain information on Mr. L.'s assets through the normal trial process. Her application forces Mr. L. to account for his financial affairs under oath before divorce summons are issued, despite the fact that in a letter dated 31 October 2016, Mr. L. undertook to account for his financial affairs in due course.

[23] I disagree that this application is inappropriate for the relief sought and granted. The main application is premised on section 8 of the MPA. It provides as follows:

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[7] Act 88 of 1984.

> ***"8. Power of court to order division of accrual***
>
> *(1) A court may on the application of a spouse whose marriage is subject to the accrual system and who satisfies the court that his right to share in the accrual of the estate of the other spouse at the dissolution of the marriage is being or will probably be seriously prejudiced by the conduct or proposed conduct of the other spouse, and that other persons will not be prejudiced thereby, order the immediate division of the accrual concerned in accordance with the provisions of this Chapter or on such other basis as the court may deem just."*

[24] The relief sought in Part B is designed to protect Mrs. L.'s right to share in the accrual against Mr. L.'s prejudicial conduct as complained about in the founding affidavit. The relief in Part A is designed to protect the accrual by preserving Trust and personal assets from being transferred for the sole purpose of frustrating the relief sought in Part B. I find nothing inappropriate about the litigation strategy adopted by Mrs. L. to protect her rights. Section 8 was designed by the legislature to deal with the scenario presented in this case. The issuing of divorce summons is not a prerequisite for such an application. Mr. L. has exercised his right to have the *ex parte* order reconsidered. This application will be considered on its merits, in the light of applicable legal principles.

[25] Mr. L. also has an opportunity to oppose Part B of the application, which will only be determined in due course. In my view, there is no merit to the complaint set out in paragraph 22 above.

[26] As indicated above, Mr. L. brought the application on the ground of non-disclosure of material facts. In her heads of argument, his counsel raised the following additional grounds:

[26.1] Material non-joinder; and

[26.2] Failure to meet the requirements of an interim interdict.

In the light of what I have stated in paragraphs 20 to 21 above, I deal with the additional grounds only in as far as they relate to questions of law.

NON-DISCLOSURE OF MATERIAL FACTS

[27] Mr. L. contends that Mrs. L. committed a material non-disclosure when she failed to disclose in her founding affidavit that there was an agreement between the parties that Mr. L.'s attorney would accept service of the section 8 application. This agreement is apparent from correspondence exchanged between the parties dated 14 and 15 November 2016. Had she so

disclosed, Makume J would not have granted the *ex parte* order. Makume J would have insisted on compliance with that agreement and postponed the application for service of the application to be effected as agreed between the parties. In my view, this ground of objection stands to fail.

[28] I quote the relevant paragraphs from the above letters below:

[28.1] The letter dated 14 November 2016, addressed by Mrs. L.'s attorney to Mr. L.'s attorney states as follows:

> "2.2 Kindly confirm that you are authorized to accept service of my client's application"

[28.2] The letter dated 15 November 2016, addressed by Mr. L.'s attorney to Mrs. L.'s attorney states as follows:

> "2. We are authorized to accept service of your client's application in terms of section 8 of the Matrimonial Property Act on behalf of our client."

[29] The subject of this agreement is the section 8 application. It is apparent from paragraph 5 above that the order sought in this application comprises of two parts - Part A for interdictory relief and Part B for relief in terms of section 8. In her founding affidavit Mrs. L. set out reasons why she seeks the relief in Part A on an *ex parte* basis. The reasons relate to her apprehension, based on threats by Mr. L., to conceal his assets to avoid being subjected to asset strip, as well as placing the matrimonial home on the market without informing her. She contends that the purpose of the relief sought and granted in Part A would be defeated by giving notice to Mr. L.. Most of the assets she seeks preserved are liquid and can be transferred at a click of a button as soon as notice of the section 8 application is served on him.

[30] The agreement reflected in paragraph 28 above does not refer to an application for an interdict. In his letter, Mrs. L.'s attorney referred to 'application' without any details as to its nature. In his response Mr. L.'s attorney referred to a section 8 application. Given Mrs. L.'s reasons for seeking the relief set out in Part A on an *ex parte* basis, as well as the formulation used by her attorney in the quotation above, it could not have been her intention to serve notice of the application on Mr. L.'s attorney prior to obtaining the interdict. There is therefore no basis for the suggestion that the agreement incorporates service of the application for an interdict. Such an agreement would be tantamount to an agreement not to obtain an interim interdict on an *ex parte* basis. It was Mrs. L.'s clear intention to surprise him with the *ex parte* order so that he is constrained from giving effect to his threats to hide the assets before the section 8

application is determined. Mr. L.'s suggested interpretation of the agreement in respect of service is not supported by the context and content of the relevant letters.

[31] In the premises, this ground of objection also stands to be rejected.

MATERIAL NON-JOINDER

[32] Mr. L. complains that Mrs. L. failed to join the following trusts that have a direct and substantial interest in the relief sought and granted: Acacia Trust, the Whitehall Trust, the Providence Trust and the Whitehall Acacia Trust (individually referred to by their respective names and collectively referred to as 'the trusts'). According to Mrs. L., all the Trusts are registered in the Ilse of Man – outside the jurisdiction of this court. Counsel for Mr. L. contended that the court order prevents the Trusts from transferring or disposing of their assets. The order also interdicts Mr. L., his nominees and the Trusts from transferring trust assets to Acacia International Retirement Scheme (AIRS). AIRS ought to be before court to protect any contractual or other right it has to claim the transfer of assets from any of the Trusts. AIRS is also registered outside the jurisdiction of this court. Mr. L. further contended that the order stands to be set aside on this ground alone.

[33] It is trite that a party with a direct and substantial interest in any order which cannot be sustained or carried into effect without prejudicing him or her ought to be joined, unless the court is satisfied that the party has waived its entitlement to be joined (*Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 657).

[34] No evidence has been placed before court, illustrating how the court order is prejudicial to the Trusts or to AIRS. What clearly appears from how the order is formulated is that the subject of the interdict is the person of Mr. L.. He does not dispute that he is a protector of the Trusts as alleged by Mrs. L. and that he is entitled in that capacity to appoint and remove trustees and to approve the distribution of Trust assets. The Trusts as legal entities or the Trustees are not subject to the interdict.

[35] Mr. L.'s failure to set out in his answering affidavit averments demonstrating how the order substantially and adversely affect the interests or rights of the Trusts renders a fatal blow to this ground of objection. His mere reliance on material non-joinder without supporting it with facts does not sustain the relief he seeks.

[36] In the premises, the above ground also stands to be rejected.

FAILURE TO MEET THE REQUIREMENTS OF AN INTERIM INTERDICT

[37] Mr. L. contends that Makume J ought not to have granted the interim interdict because Mrs. L. failed to meet the requirements for such relief.

[38] It is trite that for an application for an interim interdict to be successful, according to the decision in the well-known 1914 case of *Setlogelo v Setlogelo*, the applicants ought to meet the following requirements:

[38.1] The existence of a *prima facie* right.

[38.2] A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted.

[38.3] The balance of convenience favours the granting of the interdict.

[38.4] The absence of a suitable alternative remedy.

Prima Facie Right

[39] When determining whether the applicant has satisfied these requirements, I am also guided by the nuanced approach to this exercise articulated by Holmes J in *Olympic Passenger Services (Pty) Ltd v Ramlagan.*[8] The relevant extract from this judgment is worth quoting:

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the court will refuse an interdict. Between these two extremes falls the intermediate cases in which, on the papers as a whole, the applicant's prospects of ultimate success may range all the way from strong to weak.*
> *The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon the proof of a well-grounded apprehension of irreparable harm, and there being no ordinary alternative remedy, the court may grant an interdict.*

[8] 1957 (2) SA 382 at 383C-G.

> *"It has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of all the prospects of success and the balance of convenience. The stronger the prospects of success, the less need for such a balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him.*
>
> *"I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."*

[40] Mr. L. contends that the relief granted is draconian in that it prevents him and the Trusts from participating in AIRS, a retirement scheme that he formed. The Trusts are also prevented from transferring assets to the AIRS. It also freezes all his assets. The question for determination is whether Mrs. L. lacks a *prima facie* right to constrain him and the Trust in this manner. As already stated above, the interdict does not operate against the Trusts and AIRS. It only operates against him. The fact that relief is perceived by the person against whom it is granted as draconian does not, in and of itself warrant that it should be set aside.

[41] Mr. L. is a man of immense wealth. His wealth is haboured in the Trusts. The trust assets are part of his estate. Therefore, they form part of the accrual. Mrs. L. is entitled, by virtue of the property regime that regulates their marriage, to share in the accrual. In my view, herein lies Mrs. L.'s prima *facie right* to protect the accrual against the dissipation of Trust assets. As the protector of the Trusts, Mr. L. singularly holds enormous power to deal with these assets. The interdict is not designed to affect the day to day functioning of the Trusts or AIRS. I find nothing draconian about the terms of the interdict. Mr. L. makes a frail attempt to demonstrate how the interdict is prejudicial to him personally. He states that the assets that he is prohibited from transferring are the source of his wealth. He uses them to run his international finance business. Freezing these assets constrains his ability to generate wealth. However, he fails to demonstrate how the interdict constrains him from generating wealth. The interdict does not place an absolute bar against the transfer of trust assets. The interdict does nothing more than prohibit the person of Mr. L. from transferring trust assets to a living annuity or if he intends transferring trust or personal assets to a recipient other than a living annuity, to give 5 days' written notice to Mrs. L.'s attorney prior to doing so. He also fails in his answering affidavit to demonstrate how the interdict constrains him from conducting personal day to day transactions.

[42] As stated in paragraph 3 above, Mr. L. has personal assets that fall outside the accrual. Mrs. L. lacks a *prima facie* right to constrain him from disposing of these assets as she is not entitled to share in these assets. Mrs. L. has established a *prima facie* right to restrain Mr. L. from transferring trust assets to a living annuity or if he intends transferring trust or personal assets to a recipient other than a living annuity, to give 5 days' written notice to Mrs. L.'s attorney prior to doing so. This prohibition does not extend to assets that are excluded from the accrual. Paragraph 3 of the order granted by Makume J stands to be amended to release Mr. L. from restraint from dealing with assets that fall outside the accrual.

A well-grounded apprehension of irreparable harm

[43] When he considered the *ex parte* application, Makume J considered the following facts set out in the founding affidavit. Mr. L.'s assets (most of which are liquid) are tied up in off-shore trusts to avoid detection. He has not responded to Mrs. L.'s request to provide her with a list of his assets. He undertook to do so at the meeting of the parties and their legal representatives on 26 September 2016 and on 6 October 2016. He still has not made this information available. He has deferred the meeting between the parties and their legal representatives until an accounting of his assets is incomplete. His view is that there is nothing urgent about the matter. Not only has he failed in his answering affidavit to explain the delay in complying with this request, he has also not provided a date on which he will comply with the request. He has threatened to arrange his affairs in such a way as to frustrate the Mrs. L.'s right to share in the accrual. He also informed Mrs. L. that he is not prepared to be subjected by Mrs. L. and her attorney to asset strip. He obtained legal advice to insulate his assets from the accrual by transferring them to a living annuity. He acted on these threats by withdrawing an investment he had donated to Mrs. L.. He only returned it after being threatened by her attorney. He has put the matrimonial home on sale without discussing with or informing Mrs. L..

[44] Despite the seriousness of these allegations, Mr. L. has opted not to answer to them in his answering affidavit. These allegations show that Mrs. L. has a well-founded apprehension of irreparable harm.

[45] Mr. L. contends that the interdict ought not to have been granted because Mrs. L. has sufficient alternative remedies. The alternative remedies postulated by Mr. L. are:

[45.1] a request in terms of section 7 of the Matrimonial Property Act.

[45.2] remedies available to a party seeking to access information in a trial action such as discovery, request for further particulars and requests for admissions.

[45.3] Subpoenas *duces tecum* against third parties.

[46] The remedies in 45.2 are only competent in a trial action. Summons are yet to be issued. Therefore these remedies are not available to Mrs. L.. Mrs. L. attempted to request the information she is entitled to in terms of section 7. Two months after such a request, the information has not been forthcoming. As stated above, in his answering affidavit, no firm commitment is made regarding the timeframe within which the request for information will be satisfied. To the extent that the remedies in 45.1 and 45.3 require notice to Mr. L. or to third parties, I do not consider them to be sufficient remedies because giving notice will defeat the objective of the relief sought and granted in Part A. Even if Mrs. L. was to pursue these remedies on an *ex parte* basis, they would not preserve the accrual, which is the purpose served by the interdict. The interdict is a sufficient remedy in the light of the threats made by Mr. L., some of which he has started acting on to dissipate the accrual.

[47] Mr. L. has not set out any facts to suggest that the balance of convenience favours him. As a protector of the Trusts, he holds a lot of power in respect of the assets haboured in the Trusts. Most of these are liquid. They can be disposed of or transferred at a touch of a button, giving effect to his intention to hide the assets, avoid an asset strip and defeat any attempts by Mrs. L. to share in the accrual. Unless he is constrained from doing so, the inconvenience that Mrs. L. stands to suffer is immense. The interdict is of an interim nature. It only operates pending the determination of the relief in Part B. It contains an absolute bar of transfer of assets to a living annuity. Given the adverse consequences of such a transfer, such a prohibition is reasonable in the circumstances. Assets transferred to a living annuity are completely removed from the portfolio of the transferor for a number of years, at the end of which he is only entitled to monthly annuity income. Once removed, these assets will be out of reach for Mrs. L. and will no longer form part of the accrual.

[48] Mr. L. is still able to transfer assets to another entity or scheme provided he gives 5 days written notice to Mrs. L.'s attorney. In the absence of contrary evidence, I find that the balance of convenience favours Mrs. L..

[49] In the premises, save for modifying the order granted by Makume J as alluded in paragraph 42 above, the order stands to be confirmed.

[50] Each party requested costs in the event of their success. In my view, save for the wasted costs of 28 November 2016 which as stated in paragraph 17 stand to be borne by Mr. L., it is premature to determine a cost award at this stage. Although Mr. L. is partially successful in that the order by Makume J, stands to be slightly modified, given that he has not made out a case for the relief he seeks, being the discharge of the order by Makume J, I am not persuaded that he is entitled to costs particularly because the order by Makume J largely stands to be confirmed. However, full argument on costs was not advanced because customarily, cost disputes are settled in the ordinary course. The appropriate resort to take is to reserve costs to afford parties an opportunity to present comprehensive argument on the issue. Furthermore, costs in the application that served before Makume J were reserved for the determination of the court that hears Part B. It may be appropriate for the costs of both the application for the *ex parte* interdict as well as the reconsideration application to be considered in tandem. That decision I leave to the parties.

[50] I therefore make the following order:

ORDER

[1] Paragraphs 1, 2 and 3 of the order granted by Makume J on 17 November 2016 stand to be confirmed.

[2] Paragraph 3 of the order granted by Makume J on 17 November 2016 does not extend to assets excluded from the accrual in terms of *ante* nuptial contract concluded between the parties on 14 December 1999 and registered at the Johannesburg Deeds Registry on 22 December 1999 under reference number: H5996/99.

[3] Save for the wasted costs of 28 November 2016 to be borne by the respondent (Mr. L.), which costs shall include the costs of senior counsel, the costs of this application are reserved.

L T MODIBA
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT:	***Mr. I. V. Maleka SC***
Instructed by:	***Billy Gundelfinger Attorneys***
COUNSEL FOR THE RESPONDENT:	***Mrs. I Opperman SC, assisted by Mr. D Watson***
Instructed by:	***Clarks Attorneys***
Date of hearing:	***29, 30 November, 01 December 2016***
Date of judgment:	***12 December 2016***